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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~993~~ 655

HARVEY TERRY, PLAINTIFF IN ERROR,

vs.

THOMAS W. COSKERY.

PHILADELPHIA BAR ASSOCIATION

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

655

FILED FEBRUARY 22, 1877.

Oct 27 1877

SUPREME COURT OF THE UNITED STATES.

No. 993.

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1 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

At a stated term of the circuit court of the United States of America for the southern district of Georgia, held at the United States court-rooms in the city of Savannah, in and for the said district, on Friday, the 5th day of January, in the year of our Lord one thousand eight hundred and seventy-seven,

Present, the honorable William B. Woods, U. S. circuit judge, and the honorable John Erskine, U. S. district judge, presiding;

Among others, the following proceedings were had, to wit.

HARVEY TERRY
vs.
THOMAS W. COSKERY. } Complaint.

Be it remembered that heretofore, to wit, on the twenty-third day of December, A. D. 1874, came the said plaintiff, Harvey Terry, in his own proper person, and filed his complaint against the said defendant, Thomas W. Coskery, in the circuit court of the United States for the southern district of Georgia, in the words and figures following, to wit:

Complaint.

In the circuit court of the United States.

UNITED STATES OF AMERICA,
Southern District of Georgia:

HARVEY TERRY
vs.
THOMAS W. COSKERY. } At law.

2 Harvey Terry, a citizen of the State of South Carolina, residing at Columbia, in said State, complains that Thomas W. Coskery, a citizen of the State of Georgia, residing at Augusta, in said State, owes to and unjustly detains from him the sum of three thousand eight hundred and sixty-three dollars, with interest from the 23rd day of July, 1870; the sum of seven thousand six hundred and fifty-seven dollars, with interest from July 10, 1872; and the sum of seven hundred and eighty eight dollars, with interest from the date of filing of this petition; and says:

That by a certain statute of the State of Georgia, approved on the 27th day of December, 1836, (see act to incorporate the Bank of Brunswick, Prince's Digest of Laws of Georgia, pages 116 to 118, inclusive,) and a statute amendatory thereof, approved on the 24th day of December, 1842, (see acts of the legislature of the State of Georgia, session 1842-'3, page 26,) for the removal of said Bank of Brunswick to the city of Augusta.

Also, see a statute amendatory thereof, approved Feby. 11th, 1850, (see acts of legislature of the State of Georgia, session 1849-'50, page 60,) authorizing the increase of the capital stock of said bank, which statute subjects the increased capital to all the obligations, liabilities, and restrictions imposed and prescribed in the original
3 act chartering said bank.

Also, a statute amendatory thereof, approved on the 13th day of February, 1854, (see acts of the legislature of the State of Georgia,

session 1853–'4, page 174,) authorizing the change of name of said Bank of Brunswick to Union Bank, whereby all the corporate rights, privileges, property, and interests then existing of said Bank of Brunswick were merged in and transferred to and known as the stockholders and corporation of the Union Bank, and the stockholders of the said The Union Bank were made subject to all the corporate rights, restrictions, liabilities, and penalties imposed by the original charter of said Bank of Brunswick on stockholders of said Bank of Brunswick, which rights, restrictions, liabilities, and penalties were extended to and imposed upon the corporation and stockholders of the said The Union Bank, and the charter thereof was extended to the year eighteen hundred and eighty.

That on or before the first day of September, 1854, the stockholders of said corporation accepted the terms of said charter, elected a board of directors, which directors elected a president and cashier of the said
The Union Bank to act as the agents of the stockholders of the
4 said The Union Bank, to conduct, manage, transact a general banking business for the profit, use, and advantage of said stockholders, and for that purpose said stockholders had subscribed and did subscribe for three thousand shares of the capital stock of said bank, and paid one hundred dollars per share on each and every share subscribed, making a working capital of three hundred thousand dollars, used and employed by the said the Union Bank for the use and benefit of said stockholders; and the statues heretofore quoted extended the franchises, rights, duties, liabilities, obligations, and restrictions of the said The Union Bank and its stockholders to the year eighteen hundred and eighty.

That the board of directors, president, and cashier did establish, manage, and conduct said banking business under the name of the Union Bank, and did buy and sell exchange, discount bills and notes of credit, buy and sell gold, and did make the bank-notes of said Union Bank, signed by the president and countersigned by the cashier, of denomination' of one ($1) dollars, two ($2) dollars, five ($5) dollars, ten ($10) dollars, twenty ($20) dollars, fifty ($50) dollars, and one hundred ($100)
dollars, each with letters, numbers, and dates on said bank-notes,
5 payable to bearer on demand, and for value received by said corporation did issue, pay out, and circulate the sum as money to the amount of seven hundred and thirty thousand dollars, in strict conformity to the requirements of said charter, as will appear by a copy of the official return of said bank, (filed in the executive department of the State of Georgia as required by law,) herewith filed as part thereof, marked "No. 1," said bank-notes being paid out, used, and circulated, and intended to be used and circulated, as money during the existence of the charter of said corporation, unless payment of said bank-notes should be demanded by the bearer at an earlier date.

That by the statutes heretofore recited, enacting and authorizing the incorporation of said Union Bank, it was, among other things, enacted "That the persons and property of the stockholders in the Union Bank, with banking privileges, shall at all times be pledged and bound, in proportion to the number of dollars issued upon each of the shares that each individual or company hold, possess, are interested in, or entitled to, in said Union Bank, for the payment and discharge of the debts or contracts of said bank, or for the ultimate redemption of all notes or
bills issued or that may hereafter be issued by and from said
6 Union Bank, with banking powers and privileges, in the same manner as in simple actions of debt or common commercial cases."

That Thomas W. Coskery, the defendant in this suit, was the holder and owner of one hundred and fifty-six shares of the capital stock of said bank on the 1st day of September, 1854, and continued to be the owner and holder of said shares until the failure of said bank, and now owns the same, and as such stockholder and owner of shares, by force of said statute heretofore referred to, was a joint maker of the bank-notes of the said Union Bank thus made, issued, and circulated as money; and by reason of the assignment and failure of said bank, on the 24th day of February, eighteen hundred and sixty-six, with an outstanding circulation of said bank-notes so issued to the amount of seven hundred and thirty thousand ($730,000) dollars, said Thomas W. Coskery, by reason of his ownership of said (156) shares of stock at that date, or within six months previous thereto, by force of the statutes aforesaid, was and became the co-obligor to pay that part of said indebtedness, issued on the basis of said one hundred and fifty-six shares of the capital stock of said Union Bank, said sum or part of said indebtedness being thirty-seven thousand nine hundred and sixty dollars.

7 That on the 24th day of February, 1866, said Union Bank assigned all of its property and assets of every kind, by deed of trust, to John Craig and Chas. A. Rowland, to dispose of, sell, and convert into cash all of the said trust-fund, for the sole use and benefit of the creditors of said Union Bank who should come forward, prove their claims, and deliver up their bank-notes to said assignees, for pro-rata share of the assets of said bank.

That by its said assignment and refusal to redeem its said bank-notes, and to pay its debts on demand, said Union Bank failed to comply with the requirements of its charter; said charter was, has been, and now is subject to the penalty of forfeiture, and only remains in existence by sufferance, and not by right of law.

That the assignee of said bank did accept the trust, and did convert all the property and assets of said bank into cash, and did pay out in legal expences and in pro-rata dividends, to the creditors of said bank who proved their claims and delivered up their bank-notes to said assignees, as required by the decree of , 1869, rendered in the cause of Miles G. Dobbins vs. The Union Bank, and John Craig and Charles A. Rowland, assignee', lately pending in the circuit court of Richmond County, Virginia, a copy of the record of which cause is herewith filed, marked "A," as part hereof.

8 That, in the year 1869, said assignee paid a dividend of six per cent. to the owners of the bank-notes of said bank who had delivered up and impounded their bank-notes into the hands of said assignees, and afterwards, in the year 1870, said assignees declared a further dividend of nine per cent. on the claims so filed and proved, thereby exhausting all of the property and assets of said bank, and all of the means of said corporation to make further payments to creditors was complete and ended; that the amount of said assets thus paid out and distributed to the creditors of said bank amounted to fourty-four thousand dollars, thus leaving an indebtedness of said corporation of six hundred and eighty-six thousand ($686,000) dollars outstanding, due, and unpaid.

That when the administration of all of the assets of said Union Bank and the payment of the same to the creditors of said bank, the ultimate liability of said stockholders (as co-obligors with said corporation) to pay all of the debts of said bank then outstanding and unpaid, became due, fixed, and complete.

That, on the eighth day of June, 1869, this plaintiff filed all of the

bank-notes of said Union Bank then in his possession, amount-
9 ing to fifteen hundred and fourty-four $\frac{75}{100}$ ($1,544.75) dollars, with John Craig and Charles A. Rowland, assignees of said Union Bank, for pro-rata dividend out of the assets of said bank, as required by the aforesaid order of court referred to; that on the day of , 1869, J. O. Mathewson filed his bank-notes of said Union Bank, amounting to three thousand ($3,000) dollars, with John Craig and Chas. A. Rowland, assignees, for pro-rata dividend, as aforesaid, upon all of which bank-notes the dividends of six and nine per cent. has been paid, (and no other or further payment has been made thereon,) and upon which said bank-notes a decree of judgment was rendered on the 23rd day of June, 1870, in the said cause of Miles G. Dobbins vs. The Union Bank, and John Craig and Chas. A. Rowland, assignees, in favor of Harvey Terry, the plaintiff herein, for fifteen hundred and fourty-four $\frac{75}{100}$ ($1,544.$\frac{75}{100}$) dollars, the full amount of bank-notes proved in said cause by said Harvey Terry.

That a decree of judgment was rendered on the 23rd day of June, 1870, in the cause of Miles G. Dobbins vs. The Union Bank, and John Craig and Charles A. Rowland, assignees, in favor of J. O. Mathewson, for three thousand ($3,000) dollars, the full amount of the bank-notes proved in said cause by said Mathewson, and said three thousand
10 dollars of bank-notes and the judgment rendered thereon were assigned by said J. O. Mathewson to Harvey Terry (the plaintiff herein) on the 21st day of June, 1873, which assignment will be produced in evidence upon the trial of this cause, and that there remains due upon said bank-notes so impounded and the judgments so rendered thereon and unpaid to said petitioner the sum of three thousand eight hundred and sixty-four ($3,864) dollars, with interest from the 23rd day of June, 1870.

That on the 30th day of July, 1870, by some confederation or arrangement between some of the stockholders and some of the noteholders of said bank, in which this plaintiff did not participate, either in person or by attorney, but the said defendant did participate in the same, by attorney at least, said cause was dismissed in its then unfinished and incomplete condition without the final report of said assignees, as will appear by the record of said cause.

That Harvey Terry, the plaintiff in this cause, made demand upon John Craig and Charles A. Rowland, assignees, for the return of the bank-notes of said Union Bank so deposited and partially paid, (by marking the sum paid on each note so returned,) but the demand of said plaintiff for the return of said bank-notes so owned by himself and partially paid was refused and denied.

11 That since the year 1871, this plaintiff, in the due course of business and for a valuable consideration, became the bearer and owner of seven thousand six hundred and fifty-seven ($7,657) dollars of the bank notes of said Union Bank, and on the 10th day of July, 1872, during the business hours of the day, presented said bank-notes to John Craig, esq., as cashier of said Union Bank, and demanded payment thereof, which was refused; said plaintiff then demanded payment of said John Craig, as assignee of said bank, which was refused; said plaintiff then presented said bank-notes to Edward Thomas, esq., as president of said Union Bank, and demanded payment thereof, which was refused; whereupon this plaintiff had said bank-notes duly protested for non-payment; and afterward, in the year 1873, in the due course of business and for a valuable consideration, this plaintiff became the owner and bearer of seven hundred and eighty-eight ($788.) dollars of

the bank-notes of said Union Bank, and herewith demands payment thereof, all of which said bank-notes are the genuine issues of said Union Bank, payable to bearer on demand, signed by the president and countersigned by the cashier of said Union Bank, of the denomination, letter, date, and number of said bank-notes as shown by schedule
12 "C" hereto attached as a part hereof, and said bank-notes are deposited in the custody of the clerk of this court for inspection and proof of debt.

That Thomas W. Coskery, as the owner and holder of said one hundred and fifty-six shares, (of the capital stock of said bank,) after the administration of all of the assets of said bank as aforesaid, became ultimately liable to pay that certain part of the remaining indebtedness of said corporation issued on the basis of said shares of stock, and that said sum of money or ultimate liability amounts to thirty-five thousand six hundred and seventy-two ($35,672) dollars, and that the same is now due and unpaid.

Wherefore and in consideration whereof, and by force of said statute liability heretofore recited and referred to, said defendant became indebted to and is liable to pay to said plaintiff, on account of said bank-notes and judgments, the sum of three thousand eight hundred and sixty-three dollars, with interest from the 23rd day of July, 1870, and the sum of seven thousand six hundred and fifty-seven dollars, with interest from the 10th day of July, 1872, and the sum of seven hundred and eighty eight dollars, with interest; wherefore said plaintiff demands judgement for the sum of fourteen thousand seven hundred and
13 eight $\frac{56}{100}$ ($14,708$\frac{56}{100}$) dollars, with interest that shall accrue on said several sums of money from the date of the filing of this petition and the costs of this suit.

Wherefore your petitioner prays that proper process may issue directed to the said Thomas W. Coskery, requiring him to be and appear at the next term of the said circuit court at the custom-house in Savannah, Ga., on the second Monday in April, 1875, to answer in the premises.

HARVEY TERRY,
Plaintiff.

UNITED STATES OF AMERICA,
District of South Carolina:

Harvey Terry, a citizen of the State of South Carolina, whose name is signed to the foregoing bill of complaint, this day personally appeared before me and made oath that the facts set forth in the foregoing complaint are true and correctly stated, to the best of his knowledge, information, and belief, and to his information he believes it to be true.

Witness my hand and seal this 21st day of December, 1874.

ALBERT W. BOOKER,
United States Commissioner District of South Carolina.

14 And afterwards, to wit, on the same twenty-third day of December, A. D. 1874, process was issued, in the words and figures following, to wit:

Process.

In the circuit court of the United States for the southern district of Georgia.

UNITED STATES OF AMERICA,
Southern District of Georgia:

HARVEY TERRY
vs.
THOMAS W. COSKERY } Complaint.

The President of the United States to the marshal of the district of Georgia, greeting:

The defendant, Thomas W. Coskery, is hereby required, personally or by attorney, to be and appear at the next term of said court, to be held in the city of Savannah, on the second Monday of April next, then and there to answer the plaintiff in an action of complaint, as, in default thereof, the said court will proceed as to justice shall appertain.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Savannah, in said district, this twenty-third day of December, in the year of our Lord one thousand eight hundred and seventy.

[L. S. OF THE COURT.]

15 HARVEY TERRY,
Atty. pro se.

JAMES MCPHERSON, *Clerk.*

And afterwards, to wit, on the twenty-fifth day of January, A. D. 1875, before the return-day of said process, came the marshal and made his return thereon, in the words and figures following, to wit:

Return of service.

I have this day, 25th of January, 1875, served a copy of the within writ upon Thos. W. Coskery, personally, at his residence, in Richmond County, and State of Georgia.

The return of—

W. H. SMYTH, *U. S. M.*,
By JAS. W. JUDKINS,
Deputy.

And afterwards, to wit, on the 13th day of April, A. D. 1875, came the defendant, by his attorney, Mr. W. H. Hull, and filed his plea to the foregoing declaration, in the words and figures following, to wit:

16 *Plea.*

Circuit court of the United States southern district of Georgia, April term, 1875.

HARVEY TERRY
vs.
THOMAS W. COSKERY. } Complaint. $12,308.

1. And the said defendant comes and defends the wrong and injury when, etc., and for plea and answer says that he does not owe the said sum of money above demanded, or any part thereof, in manner and

form as said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, etc.

2. And, for further plea, this defendant saith as to said supposed cause of action in the declaration mentioned, that the plaintiff ought not to have and maintain his said suit againt him, because, he says, all of said bills on which said suit is founded were issued prior to the thirty-first day of May, 1865, and none of them since that date, and from said day to the present time said Union Bank has entirely stopped payment, ceased to do business and to have any place of business, and has been notoriously insolvent, and said bills have not, since said 31st day of May, 1865, circulated or been used as money, and on that date and ever since this defendant held the same stock in said bank that he
17 now holds; wherefore defendant saith that no liability on his part on account of said bills, nor any right of action of plaintiff therefor, has accrued since said 31st day of May, 1865; and he pleads the act of March 16, 1869, in relation to the statute of limitation in bar of the present proceedings.

3. And, for further plea in this behalf, the defendant saith, as to the said supposed causes of action in the declaration mentioned, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith that the said supposed causes of action in said declaration mentioned did not, nor did either of them, accrue to the plaintiff at any time since the thirty-first day of May, 1865; that the same, if ever, arose prior to June 1, 1865; that since June 1, 1865, none of the bank-notes in the declaration mentioned were issued by the Union Bank, and that by a failure to institute suit thereon by January 1st, 1870, as required by act of the general assembly of Georgia, approved March 16, 1869, the right of the plaintiff was forever barred.

And this defendant is ready to verify.

WM. H. HULL.
Dedt.' Atty.

18 You, Thomas W. Coskery, do swear that the foregoing defense is true to the best of your knowledge and belief: so help you God.

THOMAS W. COSKERY.

Sworn to & subscribed before me February 17th, 1875.

FRANK H. MILLER, NOT. PUB. R. C., AUGUSTA, GA.,

FRANK H. MILLER,
Notary Public, R. C., Ga.

And afterwards, to wit, on the 18th day of May, A. D. 1875, came the plaintiff, in his own proper person, and filed his replication to plea in the words and figures following, to wit:

Replication to pleas.

In the United States circuit court for the southern district of Georgia.
April term, 1875.

HARVEY TERRY *vs.* THOMAS W. COSKERY. } Debt.

Replication to pleas of defendant.

And now comes the plaintiff and, for answer to the first and second pleas of the defendant, says:

That upon that part of complainant's claim founded upon the bank-

notes filed with the assignees for pro-rata dividend out of the
19 assetts of said bank and impounded by said assignees, a court of
competent jurisdiction did adjudicate the rights and pass upon the validity of said bank-notes of this plaintiff and his assignee; and on the 23rd day of June, 1870, did give judgement thereon in favour of said Harvey Terry and J. O. Mathewson, his assignee, for the sums of fifteen hundred and forty-four $\frac{25}{100}$ dollars and three thousand dollars, and therefore said sums of money are not and cannot be affected by the statute of limitations of the State of Georgia, dated March 16th, 1869, and whereon plaintiff prays judgement for three thousand eight hundred and sixty-four dollars, with interest from the 23rd day of June, 1870.

And, for a further replication, the plaintiff says that the *plaintiff's* claim founded upon that part of the bank-notes of said Union Bank, as shown in Schedule C, amounting to eight thousand four hundred & forty-five dollars, were duly issued and circulated as money, payable to bearer, assignable by delivery, outstanding and unpaid in the hands of holders for value, whose rights had attached thereto and therein before the 31st day of May, 1865; that the said right to pay out said bank-notes under the charter of said bank, was a contract of said bank running into
the hands of the bearer of said bank-notes for circulation and
20 redemption until the expiration of the charter of said bank,
which said right and contract attached at the issueing of the bill; which rights, no power vested in the general assembly of the State of Georgia could abrogate by statute, after said bank-notes were legally circulated for value.

That this plaintiff is a non-resident of the State of Georgia, and is not bound by the laws of the general assembly of the State of Georgia, abrogating contracts already attached without the limits of said State, and he therefore answers that the act of March 16th, 1869, in relation to the statute of limitations in bar of the present proceeding is void.

That the plaintiff *as* the bearer of the sum of eight thousand four hundred and forty-five dollars of the bank-notes enumerated in Schedule C, acquired without the limits of the State of Georgia, and that a failure to institute suit thereon before the 1st day of January, 1870, does not constitute any bar to said action nor to any part of said action.

That said act of March 16th, 1869, in relation to the statutes of limitations, does not apply, and ought not to apply in bar of the present
action upon said eight thousand four hundred and forty-five dol-
21 lars of said bank-notes, because the ultimate liability of said
Thomas W. Coskery to pay the debts of said Union Bank had not attached until after the first day of January, 1870, and the bank-notes of said Union Bank did not come into the possession of this plaintiff until after January 1st, 1871, and if, therefore, assignable by delivery, they cannot be barred in his hands by said act.

Plaintiff says the pleas of the defendant are not sufficient in law. He therefore prays judgement.

HARVEY TERRY,
Complainant, per se.

Harvey Terry, the complainant in the above-stated cause, being duly sworn, deposes and says that the above replication to pleas of the defendant in said cause are true to the best of his knowledge and belief.

HARVEY TERRY.

Sworn to and subscribed before me, this 18th day of May, 1875.

N. V. WILSON,
U. S. Commr.

22 And afterwards, to wit, on the 4th day of September, A. D. 1876, came the plaintiff, in his own proper person, and filed his additional replication to plea in the words and figures following, to wit:

Additional replication to pleas of defendant.

In the circuit court of the United States for the southern dist. of Georgia.

HARVEY TERRY *vs.* THOMAS W. COSKERY. } Debt.

Additional replication to pleas of defendant, filed April term, 1875, in this cause.

And now comes the plaintiff and, for further replication to the pleas of the defendant, says:

That the act of the legislature of Georgia, dated March 6th, 1869, plead in this cause, is unconstitutional and void as a bar to plaintiff's suit; that said act, if applied as plead in this cause, takes away
23 a right of action and destroys a remedy that existed for collection of the bank-bills and judgments sued on by the plaintiff against the defendant at the date of the issue of said bank-notes, and that existed at the date of the failure of said bank.

And said act, if applied as plead in this cause, gives a defence to the defendant that did not exist at the date of the issue of the bank-notes sued on in this suit, nor at the date of the issue of the bills now in judgment sued on in this suit, nor did not exist at the date of the failure of said bank.

Plaintiff says the pleas of the defendant are not sufficient in law, and he therefore prays judgment.

HARVEY TERRY,
Plaintiff.

Harvey Terry, the plaintiff in the above-stated cause, being duly sworn, says that the above additional replication to the pleas of the defendant in this said cause are true to the best of his knowledge and belief.

HARVEY TERRY.

Subscribed and sworn to before me this 31 day of August, 1876.
JAS. G. THOMPSON,
United States Commissioner for the District of South Carolina.

24 And afterwards, to wit, on this the 5th day of January, A. D. 1877, the following further proceedings were had, to wit:

Hearing on pleas and judgment.

HARVEY TERRY *vs.* THOMAS W. COSKERY. } Complaint.

This day came the plaintiff, in his own proper person, and the defendant also comes by W. H. Hook, esq., his attorney, and, by consent of parties, it is ordered that said cause be submitted to the court upon the law and facts, with depositions, with liberty to either party to except and have writ of error.

The above case having been submitted to the court upon the law and the facts, and after argument had, it is ordered that the pleas of the defendant be sustained, and that judgment with costs of suit be rendered for defendant, to be taxed by clerk.

Therefore it is considered that the said defendant do recover against the said plaintiff his costs and charges by the court aforesaid, in form aforesaid, assessed, amounting to to the said defendant by
25 the said court now hereof increased, adjudged, and with his assent. And the said plaintiff, in mercy, etc.

W. H. HOOK,
Deft.'s Atty.

Judgment signed and filed this 5th day of January, 1877.
JAMES McPHERSON, *Clerk.*

And thereupon the plaintiff gave notice in open court that at the proper time he would file his bill of exceptions and apply for a writ of error.

And afterwards, to wit, on the 8th day of January, A. D. 1877, came the said plaintiff and filed his petition for writ of error, as follows:

In the United States circuit court.

Petition for writ of error.

UNITED STATES OF AMERICA,
Southern District of Georgia:

HARVEY TERRY
vs.
THOMAS W. COSKERY. } Debt.

And now comes the said plaintiff in error and says that the said circuit court of the United States erred in its judgment in this
26 said cause, in that the said court sustained the pleas of the statute of limitations, as plead by said defendant in *in* this action, in bar of said suit, and thereupon dismissed the plaintiff's petition, and gave judgment for the defendant; whereas the said court should have *have* overruled said pleas. And the plaintiff has excepted to said ruling and judgment.

And therefore the said plaintiff in error prays that a writ of error may be allowed, directed to the Supreme Court of the United States, to reverse said judgment with costs.

HARVEY TERRY,
Plaintiff pro se.

I consent that the plaintiff in this cause may have his writ of error allowed without giving bond for costs.

WM. H. HOOK,
Deft.'s Atty.

27 And afterwards, to wit, on the same 5th day of January, A. D. 1877, the following bill of exceptions was signed by one of the presiding judges of said court and filed in the cause aforesaid as follows:

Bill of exceptions.

In the circuit court of the United States for the southern district of Georgia.

HARVEY TERRY
vs.
THOMAS W. COSKERY. } Debt. Bill of exceptions.

Be it remembered that at a circuit court of the United States for the southern district of Georgia, begun and holden at Savannah, on Thursday the 5th day of January, A. D. 1877—present, the Hon. W. B. Woods and Hon. John Erskine, holding said court—then came on to be heard the certain cause wherein Harvey Terry was plaintiff and Thos. W. Coskery was defendant, before the said court, submitted by consent to the court without a jury. And upon the trial the plaintiff read
28 his petition as filed in said cause with the exhibits thereto attached, and read in evidence the statutes of incorporation of the Union Bank of Augusta, as set out and referred to in plaintiff's petition. Then comes the defendant by his counsel and pleads, and for answer says: (Reads his pleas.)

1st. That he does not owe the said sum of money above demanded, or any part thereof, in manner and form as said plaintiff hath above thereof complained against him; and for this he puts himself upon the country, etc.

2nd. And for a further plea this defendant saith, as to the said supposed cause of action in the declaration mentioned, that the plaintiff ought not to have and maintain his said suit against him, because he says all of said bills on which said suit is founded were issued prior to the 31st day of May, 1865, and none of them since that date; and from said day to the present time said Union Bank has entirely stop'ed payment, ceased to do business, and to have any place of business, and has been notoriously insolvent; and said bills have not since said 31st day of May, 1865, circulated or been used as money; and on that date and ever since this defendant held the same stock in said bank
29 that he now holds.

Wherefore defendant saith that no liability on his part on account of said bills, nor any right of action of plaintiff therefor, has accrued since said 31st day of May, 1865. And he pleads the act of March 16, 1869, in relation to the statute of limitations in bar of the present proceedings.

3rd. And for further plea in this behalf the defendant saith, as to the said supposed causes of action in the declaration mentioned, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith that the said supposed causes of action in said declaration mentioned did not nor did either of them accrue to the plaintiff at any time since the 31st day of May, 1865; that the same, if ever, arose prior to June 1, 1865; that since June 1, 1865, none of the bank-notes in the declaration mentioned were issued by the Union Bank, and that by a failure to institute suit thereon by January 1st, 1870, as required by the act of the general assembly of Georgia, approved March 16, 1869, the right of the plaintiff was forever barred. And this the defendant is ready to verify.

WM. H. HOOK,
Deft.'s Atty.

30 Then comes the plaintiff and makes replication to the said pleas of the defendant, and says:

That upon that part of complainant's claim founded upon the bank-notes filed with the assignees for pro rata dividend out of the assets of said bank, and impounded by said assignees, a court of competent jurisdiction did adjudicate the rights and pass upon the validity of said bank-notes of this plaintiff and his assignees; and on the 23rd day of June, 1870, did give judgment thereon in favour of said Harvey Terry and J. O. Mathewson, his assignee, for the sums of fifteen hundred and forty-four $\frac{25}{100}$ dollars and three thousand dollars, and therefore said sums of money are not and cannot be affected by the statute of limitations of the State of Georgia dated March 16th, 1869, and whereon plaintiff praps judgment for three thousand eight hundred and sixty-four dollars, with interest from the 23rd day of June, 1870.

And for a further replication the plaintiff says: That the plaintiff's claim founded upon that part of the bank-notes of said Union Bank, as shown in Schedule C, amounting to eight thousand four hundred and forty-five dollars, were duly issued and circulated as money, payable to the bearer, assignable by delivery, outstanding and unpaid in the

31 hands of holders for value, whose rights had attached thereto and therein before the 31st day of May, 1865; that the said right to pay out said bank-notes under the charter of said bank was a contract of said bank running into the hands of the bearers of said bank-notes for circulation and redemption until the expiration of the charter of said bank; which said right and contract attached at the issueing of the bill, which rights no power vested in the general assembly of the State of Georgia could abrogate by statute after said band-notes were legally circulated for value.

That this plaintiff is a non-resident of the State of Georgia, and is not bound by the laws of the general assembly of the State of Georgia abrogating contracts already attached without the limits of said State, and he therefore answers that the act of March 16th, 1869, in relation to the statutes of limitations in bar of the present proceeding is void.

That the plaintiff, as the bearer of the sum of $8,445 of the bank-notes enumerated in Schedule C, acquired without the limits of the State of Georgia, and that a failure to institute suit thereon before the 1st day of January, 1870, does not constitute any bar to said action nor to any part of said action.

That said act of March 16, 1869, in relation to the statutes of

32 limitations does not apply and ought not to apply in bar of the present action upon said eight thousand four hundred and forty-five dollars of said bank-notes, because the ultimate liability of said Thos. W. Caskery to pay the debts of said Union Bank had not attached until after the 1st day of January, 1870, and the bank-notes of said Union Bank did not come into the possession of this plaintiff until after January 1st, 1871, and it therefore assignable by delivery, they cannot be barred in his hands by said act.

Plaintiff says the pleas of the defendant are not sufficient in law. He therefore prays judgment.

And now comes the plaintiff and, for further replication to the pleas of the defendant, says:

That the act of the legislature of Georgia dated March 16, 1869, plead in this cause, is unconstitutional and void as a bar to plaintiff's suit; that said act, if applied as plead in this cause, takes away a right of action and destroys a remedy that existed for collection of the bank-bills and judgments sued on by the plaintiff against the defendant at the

date of the issue of said bank-notes, and that existed at the date of the failure of said bank. And said act, if applied as plead in this action, gives a defence to the defendant that did not exist at the date of the issue of the bank-notes sued on in this suit, nor at the date of the issue of the bills now in judgments sued on in this suit, nor did not exist at the date of the failure of said bank.

Plaintiff says the pleas of the defendant are not sufficient in law, and he therefore prays judgment.

HARVEY TERRY,
Plaintiff.

The plaintiff introduced the record of the superior court of Richmond County, Georgia, in the cause of Miles G. Dobbins et al. against John Craig and Charles A. Rowland, assignees of the said Union Bank, attached to his said bill, marked "Exhibit A," as follows:

GEORGIA, *Richmond County:*

To the honorable William Gibson, judge of the superior court of the middle circuit, holding jurisdiction in equity:

Humbly complaining, showeth unto your honor, your orators, Miles G. Dobbins, William M. & R. J. Lowry, merchants, trading under the name of William M. & R. J. Lowry & William Dougherty, who file this bill in behalf of themselves and all others who are creditors of the Union Bank, and will come in and be made parties-complainant, on the terms hereinafter prescribed, and share in the expenses of the same.

That, heretofore, the Union Bank, a body corporate by the laws of the State of Georgia, located and doing business in said county and State, being insolvent or unable to pay its debts, executed a deed of assignment to John Craig & Charles A. Rowland, both of the county and State aforesaid, purporting to convey to said assignees all the property, both real and personal, choses in action, bonds, and assets of every description of great value, all of which will more fully appear by reference to a copy of said deed and schedule annexed thereto, which are to this bill, marked "Exhibit A," and which it is prayed may be considered as a part of the same, with leave of reference as often as may be necessary. That said John Craig & Charles A. Rowland, on the day said deed was executed, accepted the same, took possession of the property herein mentioned, and took upon themselves the execution of the trust thereby created, and your orators had well hoped would have promptly executed the same as they were bound to do. But, may it please your honor, the said John Craig and the said Charles A. Rowland, regardless of their said obligation so imposed by the acceptance of said trust, have wholly failed and neglected to execute said trust in any particular to any extent, or, in any manner whatever, have not appropriated any portion of the property or assets so assigned to them to the payment of the debts of the said bank, but have retained the same in their possession and to their own use, notwithstanding more than three years have elapsed since their aforesaid acceptance, and will continue to do so, unless prevented by the timely interference of this honorable court.

Your orators would further show unto your honor that they are advised and believe that a large number of the officers of said bank, and those holding stock in the same, known as stockholders, have purchased and are purchasing, at a very low rate and at great discount, the notes, bills of said bank, and other evidences of debt against the same,

36 with a view and for the purpose of presenting the same to the said assignees and demanding from them a portion of the proceeds or money realized from the property and effects so assigned to them for the benefit of bona-fide creditors, and your orators ask that such measures may be adopted by this honorable court, by interlocutory orders or decrees, or some other such means, as may prevent the consummation of such unjust and illegal purposes. All of which actings and doings are contrary to equity and good conscience, and tend to the wrong and injury of your orators and other creditors of said bank; and forasmuch as they are wholly remediless at and by the strict rules of the common law, and can have adequate and ample relief only in a court of equity, where matters of this sort and a like nature are properly cognizable and relievable; to the end, therefore, that the said John Craig & Charles A. Rowland may, upon their several corporal oath', true, perfect, and distinct answers make to all and singular the matters and things herein charged and set forth, and that not only as to their respective knowledge and remembrance, but also as to
37 their information and belief, and that they more particularly answer:

1. Whether the said bank did not assign and they accept the same, as charged in this bill.

2. Whether they did not immediately take possession of the property and effects assigned.

3. What disposition had been made of the property, both real and personal, mentioned in said deed and schedule, from the time it went into their possession up to the present time, and the time of filing answer to this bill, giving in detail an account and disposition and use of each article, separately, and the rents and the interest and profits accruing from each; and if any portion was used and enjoyed, when and by whom?

4. That they may answer and set forth fully all their actings and doings as such assignees, and that they may account with your orators fully for the property and assets that was conveyed to them by said deed of assignment, and, by a decree of this honorable court, be compelled to distribute the trust-funds so in their hands amongst
38 the bona-fide creditors of said Union Bank, and be held to account for such neglect and breaches of said trust as they shall be convicted of on final hearing of this case, and that your honor would grant unto your orators such other and further relief as to your honor may seem reasonable and just.

May it please your honor to grant unto your orators the State's most gracious writ of subpœna, to be directed to the said John Craig and Chas. A. Rowland, requiring them to be & appear at the next superior court to be held in and for said county, then and there to answer the premises and to stand to and abide any such order and decree as may be made in the premises.

W. DOUGHERTY,
Sol. for Compts.

MILES G. DOBBINS ET ALS. *vs.* JOHN CRAIG AND CHARLES A. ROWLAND, ASSIGNEES of the Union Bank. } Bill for discovery and relief, &c. June term, 1869. Richmond superior court.

And now comes the defendants, John Craig and Charles A. Rowland, assignees of the Union Bank, and by way of amendment to their answer heretofore filed, say: That since the last term of this court, after due

39 and legal advertisement, a copy of which is hereto annexed, marked "G," as a part hereof, they have sold the seventeen thousand one hundred dollars Mississippi and Tennessee Railroad bonds, realizing the sum of eleven thousand one hundred and sixteen dollars; that they have also received the sum of two thousand four hundred and eleventh $\frac{33}{100}$ dollars, being the interest collected on the East Tennessee and Georgia Railroad bonds retained by the bank, and exchanged for notes of the bank set forth in the original answer of these defendants.

That these amounts are added to the balance due after payment of the six per cent. dividend, and after deducting expenditures, leaves on hand, as shown by the account hereto annexed, marked "Exhibit H," forty-four thousand one hundred and four $\frac{26}{100}$ dollars.

That annexed hereto, marked "Exhibit I," as a part hereof, is a list of parties who have since the 1st day of January, eighteen hundred and seventy, given notice to these defendants of their holding bills, and respecting whom these defendants ask instruction of the court as to whether they are entitled to any interest in the funds in their

40 hands, or whether the bills are barred by the statute of limitations of this State of March sixteenth, eighteen hundred and sixty-nine.

FRANK H. MILLER,
W. H. HULL,
Deft.'s Sols.

41 EXHIBIT H.

1870, Mch.	21.	To balance	32,551 58	
"	" "	interest on bonds reserved by the Union Bank, bonds exchanged for notes	2,411 33	
May	4.	To 18 Miss. & Tenn. R. R. bonds	11,115 00	
				46,077 91

CR.

Mch.	23d.	By cash paid F. H. Miller, atty.'s fees	1,000 00	
"	" "	" Constitution, Atla., advertising	12 00	
"	" "	" Chronicle & Sentinel "	12 00	
"	7.	" tax on sales	38 91	
"	"	C. B. Day, auctioneer	10 00	
June	4.	" city taxes, 1868	291 75	
	13.	" " " 1869	289 75	
"	"	commissions on receipts, 11,115, 2½	277 88	
"	"	" disbursements, 1,654.41	41 36	
				1,973 65
				44,104 26

E. E.
Augusta, 15th June, 1870.

EXHIBIT G.

Assignees' sale by Day & Dick, Charles B. Day, auctioneer.

At the lower market-house, on Tuesday, the 3d day of May next, the remaining assets of the Union Bank, the following described consolidation eight per cent. convertible bonds of the Mississippi and Tennessee Railroad Company, viz:	
9 bonds of $1,000 each, No. 531 to 539, principal payable 1st of July, 1869; interest payable 1st July and 1st January, at the city of Memphis, Tennessee	9,000

	8 bonds of $100 each, No. 722 to 729, principal payable 1st July, 1869, and interest payable 1st July and 1st January, in the city of Memphis, Tennessee	8,000
42	1 bond $100, No. 66, principal payable July, 1881, interest payable 1st July and 1st of January, in the city of Memphis Tennessee	100

Terms cash.

JOHN CRAIG,
CHAS. A. ROWLAND,
Assignees.

EXHIBIT I.

List of notes handed in since 1st January, 4th, 1870.

1870. Jany. 4th.	E. C. Femour	156	
" 11th.	W. M. & B. J. Lowry	218	
" 20.	A. Boggs	42	
Feb. 7.	Do.	150	
Mch. 9.	Do.	764	
April. 2.	Do.	242	
" 27.	Branch, Sons & Co	1,184	
May 6.	J. J. Cohen & Sons	198	
	John A. North	2,302 30	
	E. H. Gray	5,540 65	
June 15.	Branch, Sons & Co	167	
" 20.	A. Boggs	453	
" 23.	J. J. Cohen & Sons	70	
" "	W. L. High	1,500	
			12,976 65

43 TUESDAY MORNING, *26th Jany.*, 1869.

IN THE MATTER (EX PARTE) JOHN CRAIG & Charles A. Rowland, assignees of the Union Bank.

It appearing to the court that heretofore, to wit, on the 27th day of August last, at chambers, the said assignees, with notice to the creditors of said bank, their cestui que trust, or any of them, and without any opportunity being afforded them of asserting their claims or resisting the unjust claims of others upon the funds in their hands, and no case pending in court, upon the ex-parte representations and application, obtained an order or decree from the Hon. William Gibson, judge of middle circuit, requiring the creditors of said bank to present their claims within a certain period or be forever barred; directing said assignees to distribute the funds in their hands, and discharging them from all liability for or on account of said trust: Now, upon application of Miles G. Dobbins and William B. Sheppard and other creditors of said bank, it is ordered that said assignees show cause, so soon as counsel can be heard, why the order or decree should not be annulled, set
44 aside, and vacated on the ground the same was improvidently and erroneously granted, and that a copy of this rule be served on said assignees or their counsel.

MILES G. DOBBINS
vs.
JOHN CRAIG & CHARLES ROWLAND, ASSIGNEES of the Union Bank.
} Bill for account & relief & to marshall assets.

It being represented that there are other parties than those now before the court interested in the distribution of the assets of said bank in

the hands of the assignees, that said trust may be executed properly and the interest of all may be protected as far as practicable, it is ordered and decreed that all persons having demands against the said The Union Bank of the State of Georgia cause themselves to be made parties complainants to said bill, with proper allegations and statements as to their respective claim, on or before the first day of the next term of this court, otherwise such claims to be excluded in the distribution of said fund; and it is further ordered that a copy of this decree be published once a week for four months prior to the next
45 term of this court, in the Chronicle & Sentinel, Savannah Republican, Atlanta Intelligencer, Cincinnati Commercial, and New York World, and that assignees pay the expenses of said publication out of the assets of the bank in their hands.

46 *List of judgment-creditors.*

John A. North, principal debt	20,000 00
Int. 21st day of May, 1867.	
Wm. S. Herring	66,755 00
Interest 20th May, 1869.	
James M. Roberts	72,200 00
Interest 20th May, 1867.	
John B. Mills	17,500 00
Interest 21st May, 1867.	
Laroch J. Smith	3,900 00
Interest 20th May, 1867.	
John Leffingwell	75,000 00
Interest 20th day of May, 1867.	
J. W. Story, senior	12,517 00
Interest 21 day of July, 1867.	
Miles G. Dobbins	73,000 00
Interest 18th day of May, 1869.	
William Dougherty	7,756 00
Interest 18th day of May, 1869.	
Wm. M. & B. J. Lowry, principal debt	741 00
Interest 18th day of May, 1869.	
Branch, Sons & Co., principal	8,500 00
Interest 31st Dec., 1869.	

This execution is assigned to Frank H. Miller.

47 STATE OF GEORGIA,
Richmond County:

Know all men by these presents that the Union Bank, a body corporate by the laws of the State of Georgia, located and having its principal place of business in the city, county, and State aforesaid, having determined to surrender the use of its charter, and desiring in good faith to make an assignment of all its effects for the payment of its debts, has granted, bargained, sold, released, aliened, conveyed, and confirmed, transferred, assigned, and set over, and doth by these presents, grant, bargain, sell, release, alien, convey and confirm, transfer, assign, & set over unto John Craig and Charles A. Howland, of the county and State aforesaid, their heirs, executors, administrators, successors, and assigns, in fee-simple, all that lot or parcel of land in the city, county, and State aforesaid, between Campbell and McCarter streets, containing a front on Broad street of thirty (30) feet, more or less, and running through to Jones street; said lot being

one-half of a lot known on a plan of lots, made by Edward F. Campbell of said city, as lot ten (No. 10,) bounded north by said
48 Jones street, east by the remaining half of said lot (No. 10) number ten, south by Broad street, and west by a lot now, or formerly, owned by the estate of Mathew Nelson, dec'd, it being the same lot of land which was conveyed by Robert Walton, trustee, to William M. d'Antignac, president of the Insurance Banking Company, by deed dated the fifth day of September, eighteen hundred and forty-three, and recorded in the clerk's office of the superior court of said county, in book AA, folios four hundred and thirty-five and four hundred and thirty-six, and subsequently conveyed by the said William M. D'Antignac and the Augusta Insurance and Banking Company to the Bank of Brunswick, by deed dated the 30 day of November, eighteen hundred and fifty, and recorded in the clerk's office of the superior court of said county, in book FF, folio twelve, to which said deeds special reference is hereby made for a further description. Also, all the assets and effects of said Union Bank, whether real, personal, or mixed, and all the lands, houses, buildings, bonds, stocks, shares, notes, bills, money, furniture, books, credits, rights, and privileges, and all other property of what kind or nature soever the same may be, and wheresoever the same may be situated or located, to which the
49 said Union Bank may be in any wise entitled, whether in law or equity. The annexed schedule of the assets and effects of the said Union Bank is hereby made a part of this assignment, and everything therein described or referred to is intended to be hereby conveyed as well as all other property of the said Union Bank: To have and to hold all and singular the premises, with the rights and privileges and appurtenances thereunto belonging or in any wise appertaining, unto the said John Craig and Charles A. Rowland, their heirs, executors, administrators, successors, and assigns, in fee-simple forever. The foregoing conveyance is made upon the following express trusts, limitations, and conditions, nevertheless, that is to say, that the said assignee or assignees, his and their executors, administrators, and assigns, shall well and truly hold and dispose of, sell, exchange, or otherwise employ, all the assets and effects aforesaid, for the sole use and benefit of the creditors of the said Union Bank, administering and paying out the net proceeds of said assets and effects, according to the privities recognised and established by law. And the said assigne' or assignees, their heirs, executors, administrators, and assigns, are hereby author-
50 ized and empowered to use the name, rights, and privileges of the said The Union Bank to make the said assets and effects valuable, available, and effectual, in as full and complete a manner as the said The Union Bank might itself do; the said The Union Bank hereby constituting and appointing the said assignee or assignees, their heirs, executors, and assigns, attorneys in fact of the said The Union Bank, for the purposes and with the interest aforesaid, one or more attorneys under him or them for the purposes aforesaid to make and constitute, and again at pleasure to revoke.

In witness whereof, the said The Union Bank have caused these presents to be signed by Edward Thomas, the president, and John Craig, the cashier, and has caused the same to be sealed with the seal of said body corporate, this the twenty-fourth day of February, eighteen hundred & sixty-six.

[SEAL.] EWD. THOMAS,
President.

JOHN CRAIG,
Cashier.

Signed, sealed, and delivered on the day and date thereof in the presence of—

JESSE A. ANSLEY.
AUGUSTUS D. PICQUIT, *J. P.*

51 SCHEDULE.

Cash on hand uncurrent	258 00
C. S. treasury notes	73,355 50
Specie, (cents)	12 25
Notes discounted	111,108 50
Special loans	4,700 00
Bill of exchange, Columbus	2,422 23
C. S. 4.7 bonds & cents	73,700 00
C. S. $\frac{13}{100}$ notes	465,700 00
B. Bk. Cape Fear, Wilmington	146,800 00
Sta. Ga. treas'y notes	261,135 00
" " 89 treas'y notes	44,075 00
" " 79 bonds	90,000 00
" " treasury notes, 25 Dec., 1864	23,321 00
N. Carolina 8½ bond	102,000 00
National currency	2,278 81
Fla., Ala., & Gulf R. R. bonds	10 00
Greenville & Cl. bonds	50 00
Col. & Augusta R. R. stock, 280 shares, new stock Charl. & Savannal R. R. bond	7,500 00
Fla. R. R. bonds	28,800 00
Real estate, (bkg. house & lot)	
Shoe & Leather Bk., N. Y.	6 12
Howard Bkg. Co	3 06
Exchg. R. K., Pittsburg	3 06

JESSE A. ANSLEY.
AUGUSTUS J. PICQUIT, *J. P.*

52 In equity, in Richmond superior court, at chambers, Aug. 6th, '68.

EX PARTE JOHN CRAIG & CHAS. A. ROWLAND, assignees of the Union Bank.

In the matter of the application of John Craig and Charles A. Rowland, assignees of the Union Bank, for advice and direction in discharge of their trust, and for a discharge therefrom.

On reading the foregoing petition, (for direction and discharge from their trust,) it is, on motion of Frank H. Miller, solicitor for petitioners, ordered that all parties holding claims against, or the bill of said Union Bank, lately doing business in the county of Richmond and State of Georgia, do present the same to the said John Craig and Charles A. Rowland, assignees of said bank, within six months from the date of the publication of this order, or be forever barred from any participation in the assets in the hands of said assignees to be distributed, and at the expiration of said six months the said assignees, after deducting commissions and expenses to the creditors who shall have then filed their claims pro rata according to their legal priorities, and upon their making such distribution and payments, the said assignees shall

53 be forever free from all responsibility for said trust. And it is further ordered that this order be published once a week for three months in one public gazette in the cities of Savannah, Atlanta, Montgomery, New York, Cincinnati, and Augusta.

WM. GIBSON,
Judge Superior Court.

MILES G. DOBBINS ET ALS.
vs.
JOHN CRAIG & CHARLES A. ROWLAND, assignees of the Union Bank. } In equity.

It appearing to the court that an order granted at the last June term of this court, directing all persons having claims against the Union Bank to come in and be made parties to said bill, has been published pursuant to the terms of said order, and the following-named persons and firms having presented claims against said bank in obedience to said order, which claims are now produced by the assignees: It is ordered that said persons be made parties complainant, to wit: John J. Cohen & Son, Thomas G. Barrett, John Leffingwell, Harvey Terry, Henry
54 W. Carr, Laroche J. Smith, James M. Roberts, John W. Stoy, senior, Branch Sons & Co., Joseph Summerson, Joseph Myers, Benjamin B. Russell, John P. Force, P. S. Marsh, J. S. Jones, George B. Mills, L. Marris, Joseph J. Mathewson, L. Kohn, Haskell & Co., E. G. Moses, jr., M. Francisco, Wm. L. Herring, Archibald Boggs, R. W. Jones, Underwood & Rowell, J. G. Cohen, Mary Harris, Harrison W. Riters, George A. Allen, Geo. P. Curry, B. H. Clowes, and John A. North, all of whom, with complainants, have received dividends from the assignees of six per cent. on bills presented prior to January, 1870, and also Thomas & Dearing, T. McKinne Law, Thomas S. Sewell, John Carter, Henry L. Mason, H. McCrea & Co., John Ranage, S. S. Davis, J. D. O'Leary, J. & T. Green, O. Watson, trustee, Walter Lowner, Kessan & Co., Thomas Sweeny, J. J. Brown, John King, L. Cohen, S. Fowler, W. B. Berry, S. R. Vaughn, R. G. Jones, E. C. Tumin, and E. H. Guy who have given notice of their claims, but received no dividends.

SAME
vs.
SAME.

Tried by the following jury:

55
1. A. L. Harris.
2. D. A. Felhot.
3. W. K. Thompson.
4. A. S. Bignon.
5. Jno. P. K. Miller.
6. H. R. Philpot.
7. Wm. H. Jaillett.
8. Robt. W. Adams.
9. Charles Stowe.
10. John D. Smith.
11. Henry Campfield.
12. A. B. Cromp.

Verdict.

We, the jury, find the following verdict and decree in the above-stated case:

1. We find the report and answer of the assignees, with the exhibits annexed thereto, correct and true; that their accounts are sustained by proper vouchers, and that the interlocutory order and decree at the June term, 1869, directing publication for creditors to come in and prove their demands, has been fully performed by them.

2. That the complainants to whom have been issued certificates by the assignees, or the lawful and bona-fide owners of the said certificates, for the bills of the bank, by those who have deposited bills with the assignees and received no certificates therefor, shall be deemed creditors of the bank for the full amount of such certificate, or deposits subject to credit for the amount already paid them. In this are in-
56 cluded the persons who have presented the bills since the first day of January, 1870.

3. That the commissions reserved by the assignees in their answer be allowed them, and that they be allowed two and one-half per cent. for the payment over of the balance in hand.

4. That the assignees be allowed as additional counsel fees the sum of two thousand dollars, of which amount they shall pay one thousand dollars to Wm. H. Hull, esqr., and one thousand dollars to Frank H. Miller, esqr.

5. The *the* assignees shall reserve in their hands a sufficient sum to pay the cost of this proceeding, together with the costs of other suits at law or in equity, brought by complainants to the original bill and others in this and other courts against the assignees and certain of the stockholders of the Union Bank, also for the payment of such taxes and other expenses as they are liable to pay on account of the trust, and sufficient sum for their final return. That having made these payments and reservations, they shall proceed speedily as possible to distribute the residuum of the cash funds in their hands, as follows:

1st. They shall pay to those creditors who have received no
57 dividend six per cent. on the face of their bills.

2. They shall divide the remainder of the cash balance in their hands equally pro rata among all the creditors for the amount they are by this decree deemed creditors.

6. That in making payments, that the assignees pay over to Frank H. Miller the amount found due to William Dougherty, or any other complainant or creditors represented by him as attorney.

7. That upon compliance with this decree the assignees shall be discharged from any and all liability for on account of said trust.

June 23d, 1870.

A. F. BIGNON,
Foreman.

Whereupon it is considered by the court that the verdict of the jury be confirmed and stand as the judgment and decree of this court in the terms in which it is rendered.

June 23d, 1870.

WM. GIBSON, *Judge.*

58 STATE OF GEORGIA,
Richmond County:

I, Goode Bryan, dep'y clerk of the superior court of said county, do hereby certify that the above and foregoing twenty-two pages contain the schedule of assets of the assignment, orders of court, advertising for creditors to file claims, the list of judgment creditors, (this extract is only the names of the creditors, and the amound due each,) the verdict of the jury, & decree of the court for the final distribution and discharge of the assignees. No further paper as to the final payment to creditors is filed in my office.

Witness my hand and seal this 2nd day of March, 1874.

SUPERIOR COURT } GOODE BRYAN,
SEAL, RICHMOND. } *Dep'y Clerk Sp. Ct.*

MILES G. DOBBINS ET AL. *vs.* JOHN CRAIG AND CHARLES A. ROWLAND, assignees of the Union Bank.	Bill for discovery, relief, &c., to June term, 1869, Richmond superior court.

59 The joint and several answer of John Craig and Charles A. Rowland, assignees:

These defendants, now and at all times saving and reserving to themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, (and by no means waiving their plea already filed,) for answer thereto, or to so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, those defendants, answering, say:

That they admit that heretofore the Union Bank, a body-corporate of this State, located in the city of Augusta, being insolvent by reason of loans of money, and their bills to the State of Georgia and confederate government during the late war, and unable to retain its circulation so issued and pay its debts, on the fourth of February, 1866, pursuant to a meeting of the stockholders called for the purpose of surrendering its charter and making provision for the desposition of its assets, executed a deed of assignment, a copy of which, marked "A," is annexed to complainants' bill.

60 That upon the delivery of said deed these defendants accepted the trust, and acting by John Craig, one of their number, (who assumed and undertook the entire active management of the matter,) received the assets set forth in the schedule annexed to the assignment, with the real estate described in the deed, and proceeded to the discharge of the duties of assignees.

These defendants know nothing, save from the statements of complainants in their bill, as to their being holders of the bills of the Union Bank, and from having heard that they obtained judgments against said bank, but that they believe, and so expressly charge, that the bills owned by complainants were purchased by them after the same had been issued for war-purposes, and after the bank had ceased to do a banking business, at a low figure, when the bills had ceased to circulate as money, and that complainants purchased the same on speculation, and are not entitled to receive, in any event, more than they actually paid; and these defendants pray that complainants may be compelled, along with all other parties becoming complainants, to state,

61 under oath, when they purchased said bills, at what price, from whom, and for what purpose; whether they were residents of the Confederate States during the late war, & if not, where they resided.

That these defendants deny that they have failed to execute their trust, as alleged, but that on the contrary they have acted as in their judgment was best for the interest of the creditors of the bank, after consultation with persons of wisdom and busjness experience.

That the large bulk of the assets received were totally valueless, and that those remaining of negotiable securities were commanding very low prices in the market at the time of their receipt.

That in their judgment and that of experienced business men, they deferred a sale of the assets until such time as they would realize their full value in the market and pay the largest dividend to the creditors of the bank.

That shortly after their appointment as assignees they gave notice

through the newspapers requiring all bill-holders or their creditors to present their bills within twelve months, or they would lose their
62 priority; a copy of which notice is hereto annexed, marked "Exhibit A."

That the bills came forward slowly, so much so that out of seven hundred and thirty-four thousand two hundred and twenty-seven dollars reported to them as the circulation of the bank outstanding on the day of assignment, but three hundred and eighty-two thousand seven hundred and eighteen dollars had been presented or notice given thereof up to August twenty-seventh, eighteen hundred and sixty-eight, when these defendants, pursuant to an order of this court at chambers, published notices requiring all bill-holders to present their bills with' six months or they would be forever barred.

That annexed hereto, marked "Exhibit B," is a list of all bill-holders who have presented their bills or given notice thereof in person or by attorney, with the date and amount thereof; but that many of these parties have sold out their bills to other parties, and defendants cannot state that the same is correct as to the present owners.

Further answering, these defendants say that at the time of their appointment as assignees an informal committee from the stock-
63 holders was appointed as an advisory committee, to whom these defendants were requested to apply for advice from time to time as any question arose in the management of the assets of the bank.

That in eighteen hundred and sixty-seven this committee were of opinion that an advantageous *management* could be made with certain bill-holders of the bank by the exchange of certain of the securities held by these defendants for certain bills held by the creditors.

That, acting on this opinion and under the advice of said committee, this defendant, John Craig, exchanged sixteen thousand dollars of bonds of the Greenville and Columbia Railroad Company for seventy-five thousand dollars of the notes of said bank, thereby reducing the circulation of the bank down to six hundred and sixty-nine thousand two hundred and twenty-seven dollars; that these defendants considered the same at the time a most advantageous arrangement for the remaining bill-holders, and that the effect is the same as would have been produced by retaining the bonds down to the subsequent sale of the entire assets.

64 These defendants, further answering, say that, being satisfied, as the year eighteen hundred and sixty-nine advanced, that the political and business matters of the country had become settled as much as it was possible to be done for a long time, and the securities in their hands having advanced, they, on the first Tuesday in June, eighteen hundred and sixty-nine, at the lower market-house, in the city of Augusta, proceeded to sell at public outcry the assets in their hands, after advertisement of the sale for about forty days in the newspapers.

That annexed hereto, marked "Exhibit C," is a copy of the advertisement, and Exhibit D a copy of the sales, as reported by the auctioneer.

That this sale comprised all the property in their hands turned over to them by the terms of the deed of assignment. That at the time of said assignment there was reserved by the directors of the Union Bank the sum of ten thousand dollars in bonds of the East Tennessee and Georgia Railroad, and seventeen thousand one hundred dollars in Mississippi and Tennessee Railroad bonds, to be applied specially to
65 the payment of counsel fees in defending actions depending and to be brought against said bank; that of this amount ten thousand dollars of East Tennessee and Georgia Railroad bonds was ex-

pended and ninety thousand eight hundred and forty-two dollars of the circulation of the bank purchased therewith in the same manner as was done by the defendants, thereby reducing the entire circulation of the bank to the sum of five hundred and seventy-eight thousand three hundred and eighty-five dollars.

That there still remains on hand the sum of seventeen thousand one hundred dollars in Mississippi and Tennessee Railroad bonds, which, since the sale have been turned over to the defendants as assignees, and still remain on hand as assets in hand unsold.

That after such sale in June, eighteen hundred and sixty-nine, these defendants declared a dividend of six per cent. on the entire circulation of the bank, and have paid the same to all such persons presenting bills prior to January first, eighteen hundred and seventy.

That as to such persons who may present bills since January
66 first, eighteen hundred and seventy, these defendants submit the question to this court for their instructions as to whether, under the limitation act of this State of March 16th, eighteen hundred and sixty-nine, such persons are entitled to receive any share in the assets in their hands.

Further answering, these defendants say that they have no knowledge or information as to whether the late officers of said bank, or the stockholders, have purchased or are purchasing at a low rate the bills of said bank for the purpose of receiving a distributive share of the assets of the bank thereon. These defendants believe that some of the late officers and stockholders have purchased, through their friends or by themselves, bills of said bank in order to protect themselves against their personal liability under the charter of the bank, as they had the right to do, and will claim also the dividend due on their bills, provided the bills are not thus reduced below the full amount of their liability as stockholders, but these defendants cannot state which they are. They know no dividends have been paid to late officers of the bank or stockholders, but insist if bills had been presented they would have
67 been entitled to the dividend. This defendant, John Craig, admits that at his request his friend John A. North has purchased bills of said bank sufficient to cover this defendant's liability as stockholder, and has received the dividend of six per cent. thereon, and he insists that he had a right to do so, and that it would be legal and right, even if the dividend had been paid from this defendant as assignee to himself as bill-holder.

To the interrogatories propounded in complainant's bill these defendants say:

1. Said bank did make an assignment and they accepted the assignment as charged.

2. That they immediately took charge, through John Craig, one of them, of the effects assigned and set forth in the assignment and schedule annexed thereto.

3. That they have already answered as to the disposition of each article received, as will appear from the Exhibit C, D, E, & F, from the time they received them until the present; that the only rent received was the banking-house of the Union Bank, which was used by this defendant, John Craig, as an office, and wherein he carried on, at
68 the same time, the business of banker and broker, charging the rent thereof against himself, at six hundred dollars per annum, being the amount fixed by the directors as what ought to be paid at the time of the assignment.

4. That they have already answered fully and set forth all their acts

and doings as assignees, and are prepared to account as may be decreed by the court and distribute the assets remaining in their hands among those entitled to receive them.

And to the end that said complainants or those who may become complainants may, upon their several and respective corporal oaths, answer the matters alleged in this answer, and touching which discovery is sought by these respondents, may it please the court that said complainants be required to respond to the following interrogatories, each answering for himself.

1. Where does he reside and where did he reside during the late war? Does he not know that the largest portion of the circulation of said bank was put out during the said war as a loan, for war purposes, to the Confederate States and State of Georgia?

69 2. When did he become possessed of the bills of said bank now held by him? Did he not acquire all of them after the close of the late war? If not, how long before? Has he not received a dividend of six per cent. on the said bills from the assignees already?

3. What price did he pay for the bills? What was the highest and what was the lowest price paid, and what the average price? From whom were they purchased or received, and if any were bought with confederate money, state what was its value at the time.

4. Had not said bills ceased to circulate as money before he became the owner thereof, and had not the said bank ceased to do a banking business when he purchased?

And that each complainant may answer all of said interrogatories. And, these respondents having fully answered said bill, they pray for a decree directing such a disposition of the assets in their hands as may be in conformity to the terms of the trust and agreeable to equity, and further pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

FRANK H. MILLER,
Defendants' Solr.

70 STATE OF GEORGIA,
Richmond County:

You, John Craig and Charles A. Rowland, do swear that, what is contained in your answer, as far as concerns your own act and deed, is true of your own knowledge, and that what relates to the act or deed of any he r person you believe to be true.

JOHN CRAIG,
CHAS. A. ROWLAND.

Sworn & subscribed before me this twenty-third day of March, 1870.
[NOT. PUB. SEAL.] CHAS. E. COFFIN,
Notary Public Richmond Co., Ga.

EXHIBIT A.

Notice.

An assignment of the assets of the Union Bank of this city was made to the undersigned assignees on the 24th day of February, 1866.

Holders of all claims against this bank are hereby notified to present the same within the time prescribed by law.

JOHN CRAIG,
CHAS. A. ROWLAND,
Assignees.

71 EXHIBIT C.

Assignee's sale.—Union Bank of Augusta, Ga.

The undersigned will offer for sale to the highest bidder, at public outcry, on Tuesday, the first day of June next, at the lower market-house, in the city of Augusta, between the legal hours of sale, the following-described property, the same having been assigned to us by the Union Bank for the benefit the creditors of said bank, and now offered for sale in execution of said trust. It is to be understood that all bids are to be made in legal currency. Purchasers of real estate will have to pay for stamps and papers.

Real estate.

Consisting of banking-house and lot, situated on the north side of Broad street, in the city of Augusta, between Campbell and McCartan streets, fronting thirty feet on Broad street and running through to Jones street one hundred and eighty feet. The improvements consist of a three-story brick dwelling and banking-house below and dwelling overhead.

72 *Bonds, stocks, & notes.*

Confederate States treasury notes		73,355 51
Louis De Laigle's note in confederate currency, balance due		55,706 00
W. B. Houston, Confederate States treasury-notes, (collateral, 60,000 7-30 C. S. T. notes)	33,000 00	
Cook & Brother, (accepted Chas. B. Day,) balance due in C. S. T. notes	6,477 50	
R. G. Lamar	20,000 00	115,173 50
W. K. Briers, Columbus, Ga		832 63
J. A. Green & Bros., endorsed by R. H. Powell, Columbus, Ga		1,589 70
Confederate States bonds and certificates, 4 per cent		73,000 00
Confederate States bonds, 7-30		465,700 00
Notes; State of Ga. 6-per-cent. treasury notes		261,135 00
State of Georgia 8-per-cent. treasury-notes		44,075 00
Bond issued 1st May, 1862	30,000 00	
State of Georgia 7-per-cent. bonds, issued 1st Feb., 1862	60,000 00	90,000 00
State of Georgia 25th December treasury notes		22,321 00
North Carolina 8-per-cent. bonds		102,000 00
Greenville & Columbia Railroad bonds, 7-per-cent., guaranteed by the State of South Carolina		34,000 00
Greenville & Columbia certificate' of indebtedness, 34 of 500		19,000 00
Greenville & Columbia certificate' of indebtedness, 3 of 100		300 00
Greenville & Columbia certificate of indebtedness, 1 of		26 84
Columbia & Augusta Railroad stock, 280 shares, $25 each		7,000 00
Florida Railroad Company, free-land bonds for which land has been given	27,000 00	
Coupons	1,800 00	28,000 00

JOHN CRAIG,
CHAS. A. ROWLAND,
Assignees.

73 EXHIBIT B.

List of notes and time of notices given.

1867.				
Jany. 18.	Jas. M. Francisco,	St. Louis, Mo.,	notes	260 00
"	Hiskell & Co.,	do.	"	463 00
21.	E. G. Moses,	do.	"	230 00
22.	Thomas & Dearing,	Athens, Ga.,	notice	822 00
30.	McKinne Law,	Augusta, Ga.,	notes	3,758 00

	31.	Thomas S. Serrill, New Orleans, La., notice		8,725 00
Feby.	5.	John Carter, Monroe, Ga., "		10 00
	"	Jasper N. Pitman, State Line, Ga., note		2 00
	9.	Geo. B. Mills, Augusta, Ga		17,500 00
	16.	Henry L. Mayson, Augusta, Ga		16,392 00
	19.	J. Liffingwell " "		75,000 00
	22.	W. E. Jackson, prest., " " notice		178 50
	"	J. M. Burdell, agt., " " "		79,299 00
	"	A. A. Beall, agt., " " notes		100 00
	23.	H. W. Carr, " " "		2,308 00
Apl.	5.	W. A. Walton for H. McCrea & Co., Nashville, Tenn., notice		4,835 00
	" "	" " Jno. Ramage, " " "		300 00
	12.	J. C. C. Black, " Wm. Dougherty, Atlanta, Ga., demand		7,746 00
	" "	" " " " S. S. Davis, " " "		3,757 00
	" "	" " " " M. G. Dobbin, " " "		300 00
	" "	" " " " W. M. & R. J. Lowry, Augusta, Ga., "		788 00
	20.	J. D. O'Leary, Augusta, Ga., notice		6,000 00
1868.				
Aug.	27.	Geo. P. Curry, " " notes		19,347 00
Sept.	22.	Jas. Summerall, " " "		110 00
	"	J. & T. Green, Jackson, Miss., "		2,499 50
	30.	Jno. P. Force, Augusta, Ga		510 00
Oct.	27.	J. G. Cohen, by C. Campbell, Augusta, Ga., notes		435 00
Dec.	22.	S. Watson, trustee, Nashville, Tenn., notes		3,426 00
1869.				
Jany.	6.	Jas. Myers, Augusta, Ga., "		533 00
	"	L. Morris, by J. Morris, New York, "		1,611 00
	"	Branch Sons & Co., Augusta, Ga., "		4,126 00
	11.	Walter Towner, Glascock Co., " "		23 00
	16.	A. Boggs, Augusta, " "		1,795 00
	26.	Kissan & Co., New York		352 00
	30.	Thos. Sweeney, Augusta, Ga., notes		649 00
Feb.	4.	J. J. Brown Griffin, " "		50 00
	11.	A. Boggs, Augusta, " "		867 00
	12.	Do. " " "		91 00
	"	G. P. Curry, " " "		153 00
	"	J. J. Cohen & Sons, " " "		2,399 00
	"	John A. North, " " "		25,640 00
	20.	J. L. Jones, Covington, " "		60 00
	18.	Branch Sons & Co., Augusta, " "		18,000 00
74	Feb. 24.	Branch Sons & Co., for Jno. King, Columbus, Ga., notes		2,459 00
	"	L. Kohn, by J. O. Matherson, New York, "		780 00
Aprl.	22.	Geo. P. Curry, Augusta, Ga.,	"	3,777 00
May	7.	P. S Mason, " "	"	771 00
	10.	J. O. Matherson, " "	"	3,000 00
	11.	B. H. Clowes, Franklin Co., Tenn.,	"	58 00
	14.	Geo. P. Curry, Augusta, Ga.,	"	1,882 00
	17.	S. Towler, by P. C. & Co., Warrenton, Ga.,	"	200 00
	"	W. B. Berry, Newnan, Ga.,	"	710 00
	"	A. Boggs, Augusta, "	"	498 00
	22.	L. R. Vaughn, " "	"	29 00
June	1.	A. Boggs, " "	"	749 00
	7.	L. J. Smith, New York,	"	3,905 00
	"	J. M. Roberts, " "	"	2,200 00
	8	G. P. Curry, Augusta, Ga.,	"	1,677 50
	"	Harvey Terry, Richmond, Va.,	"	1,544 75
	15.	Branch, Sons & Co., Augusta, Ga.,	"	8,538 00
	19.	Jno. W. Stoy, sr., " "	"	12,517 00
	21.	Geo. P. Curry, " "	"	505 00
	"	B. H. Clowes Franklin Co., Tenn.,	"	170 00
1869.				
Jany.	26.	A. Boggs, Augusta, Ga.,	"	1,023 00
July	5.	B. B. Russell, " "	"	100 00
	23.	H. W. Carr, " "	"	148 70
	27.	J. J. Cohen & Sons, " "	"	1,415 75
	28.	A. Boggs, " "	"	386 75
	9.	W. Dougherty, Atlanta, "	"	26,501 00
	11.	Branch, Sons & Co., Augusta, "	"	2,164 00
	24.	Do. " "	"	10,000 00
Sept.	23.	A. Boggs, " "	"	560 00

	24.	B. H. Clowes, Franklin Co., Tenn.,	"		63 00
	25.	Underwood & Rowell, Rome, Ga.,	"		528 00
Oct.	18.	A. Boggs, Augusta, "	"		311 00
	19.	Branch Sons & Co., " "	"		3,055 00
	23.	A. Boggs, " "	"		210 00
Nov.	5.	Do. " "	"		1,050 00
	"	J. A. North, " "	"		18,854 50
Dec.	3	R. G. Jones, Chattanooga, Tenn.			50 00
	14.	H. M. & R. J. Lowry, Atlanta, ...			760 00
	20.	W. Dougherty, for M. Harris, Atlanta, Ga.			1,000 00
	"	" " H. Riley, " "			12,640 00
	30.	H. M. & O. J. Lowry, " "			1,006 00
	"	Jno. J. Cohen & Sons, Augusta, ...			1,253 00
	31.	A. Boggs, "			763 00
	"	Do. "			686 00
75	1870.				
	Jan'y 4.	E. C. Temour, New Orleans			156 00
	11.	H. M. & R. J. Lowry, Atlanta			206 00
	20.	A. Boggs, Augusta			42 00
	Feb'y 7.	Do "			150 00
	Mch. 9.	Do "			764 00

EXHIBIT D.

Sales at lower market, Tuesday, 1st June, 1869.

1.	Union Bank building, house & lot & 2 clocks, 1 old carpet, 2 desks, 12 chairs, 2 book-cases, 1 wash-stand, 2 tables, 2 stoves, 1 pair gold-scales in glass case, E. F. Gallaher		11,200 00
2.	73,355 $\frac{50}{100}$ Confdt. S. T. notes, John Craig		10 50
3.	Louis De Laigles note conf. currency, bal. due 55,706, Jno. J. Cohen		1 00
4.	W. H. Houston's note, 33,000, colat. 60,000 7-30, S. D. Heard		20 00
5.	Cook & Bros. note accepted by C. B. Day, bal. due in C. S. treas. notes 6,477 $\frac{50}{100}$, John S. Davidson		15 00
6.	B. G. Lamar, Conf. States T. note 20,000, R. T. Curry		9 50
7.	W. K. Brier's note before the war 832 $\frac{63}{100}$,	do	11 00
8.	J. A. Green & Bros. end's'd by R. H. Powel, 1,589 $\frac{70}{100}$	do	12 50
9.	Conf. States bonds & cents of 4 %, 73,000.	do	6 00
10.	" " " 7-30, 465, 700, Chas. Estes		22 00
11.	State of Ga. 6 % treas. notes, 261, 135, J. J. Cohen		440 00
12.	" " " 8 % " " 44, 075, do		102 00
13.	" " " 7 % " " issued May 1st, '62, $30,000, T. P. Branch		102 50
14.	" " " 7 % bonds issued 1 Feb., '62, $60,000, Dr. E. W. Hasker		220 00
15.	" " " treas. notes " 25 Dec. '62, 22,321, Harry Carr		55 00
16.	10 bonds N. C. 8 % of *of* 1,000 each, @ 2,	do	20 00
17.	20 do " " " " " @ 2,	do	40 00
18.	20 do " " " " " @ 1 $\frac{60}{100}$	do	32 00
19.	42 " " " " " " @ 1.40	do	72 80
20.	1 Greenville & Cola. R. R. 7 % bond given by St. S. C., 500 each, 64, T. P. Branch		320 00
21.	10 Greenville & Cola. R. R. 7 % bond given by St. S. C., 500 each, 62½, T. P. Branch		3,125 00
22.	10 Greenville & Cola. R. R. 7 % bond given by St. S. C., 500 each, 62½, T. P. Branch		3,125 00
20.	1 Greenville & Cola. R. R. 7 % bond given by St. S. C., 500 each 62½, J. J. Cohen		14,687 50
24.	38 Greenville & Colo. R. R. certif. of indebtedness, 500 each, 19,000, 50½ J. J. Cohen		11,495 00
76	25. 3 Greenville & Cola. R. R. 7 % bonds for 100 each, & one of 26.48, 59½	J. J. Cohen	194 46
	26. 10 shares Cola. & Aug'a R. R. stock, per share, 13½,	do.	131 25
	27. 10 do. do. do.	12⅝, T. P. Branch	127 50
	28. 10 do. do. do.	12⅝, "	126 25
	29. 10 do. do. do.	12½, "	125 00
	30. 100 do. do. do. @	13⅛, Dr. W. H. Tutt ..	1,312 50
	31. 50 do. do. do. @	13, do. ..	650 00

32.	90	do.	do.	do. @	13¼. Wm. Howard...	1,181 25
33.	Florida R. R. Co., Freeland bonds, for which land has been given			27,000	C. T. McCoy...	975 00
	And coupons			18,000		
						49,967 75

EXHIBIT E.

Assignees of Union Bank.

DR.

1866.		
Feb'y 24.	To balance, as per assignment	2,278 81
Aprl. 4.	" 2 mos.' rent	100 00
Aug. 3.	" 4 " "	200 00
1867.		
Jan'y 2.	" 5 " "	250 00
July 1.	" 6 " "	300 00
1868.		
Mch. 25.	" 8 " "	400 00
Nov. 18.	" 9 " "	450 00
1869.		
May 6.	" 5 " "	250 00
June 1.	" uncurrent confederate notes	10 00
	" 73,355.51, C. S. treas. "	10 50
	" specie, (cur't prices)	12 25
	" Louis De Darghe's notes, 55,706	1 00
	" W. B. Houston notes, 30,000; colat., 60,000	20 00
	" Cook & Bros.' acct, C. B. Day, bal. 6,477.50	15 00
	" R. G. Lamar's note, 20,000	9 50
	" W. K. Brier's " 832.63	11 00
	" J. A. Green & Bros., end. R. H. Powell, 1,589.70	12 50
	" Conf. States 4 % bonds & cents., 73,000	6 00
	" " " 7-30 " 465,700	22 00
	" Ga. 6 % treas. notes, 261,135	440 00
	" " 8 % " " 44,470	102 00
	" " 6 % bonds, 30,000	102 50
	" " 7 % " 60,000	220 00
77	To Ga. 25 Dec., '62, treas. notes, 22,321	55 00
	" N. C. 8 % bonds, 102,000	164 80
	" Fla., Atlantic, Grey & Co., & C. R. R. bonds, 100,000	6,000 00
	" Greenville & Colo. R. R. bonds, 34,000	21,275 50
	" " " certf. of indebt., 19,326.84	11,689 46
1869.		
	To Cola. & Auga. R. R. stocks, 280 shares	3,653 75
	" Florida, Freeland bonds, 28,800	975 00
	" house & lot	11,200 00
	" Chatta. & Savh. R. R. stock	1,537 50
	" Shoe & Leather Bank, New York	6 12
June 1.	" Howard Banking Co., " "	3 06
18.	" Mutual Insurance scrip	31 50
21.	" Letter-press, old	5 00
1870.		
Feb'y 4.	" Ga. House Insurance scrip	25 00
		61,819 91

CR.

1866.		
Feb. 10.	By stamps on assignment deed	10 50
24.	" recording " "	2 50
July 14.	" insurance	100 00
Aug. 14.	" J. W. Jones & Co.'s bill repairs	189 85
Sept. 26.	" City taxes for 1866	265 00
Oct. 4.	" advertisement of assignees	12 00
May 27.	" Asst. C. & S. stock, 112.50, & ex. ft. 60	113 10
July 6.	" Praport to Cooking & Fargo receipt, H. W. Case	15 00
10.	" insurance	100 00
Sept. 14.	" city taxes	240 00
Dec. 26.	" judgment T. R. Rhodes, 193; attys. fees, 33	226 00

1868.				
July	13.	By city taxes for 1865		1,003 50
	19.	" State " " " real estate		180 00
Apl.	7.	" convention" " " "		20 00
June	24.	" postage		45 00
July	2.	" insurance		100 00
Aug.	26.	" assessment Freeland bonds		190 80
Sep.	12.	" Montgomery Advertiser		44 50
	"	" Journal of Commerce, N. Y		98 53
	"	" News & Herald, Savannah		35 00
	14.	" Cincinnati Enquirer		78 25
	26.	" Chronicle & Sentinel		24 00
	"	" court costs		3 20
Oct.	1.	" assessment Fla. & C. R. R. bonds		315 00
Nov.	17.	" C. F. McCoy, insurance on bonds		42 35
78 Nov.		16. By Atlanta Intel'igencer		32 50
Dec.		11. " stamp on scrip		25
	31.	" M. G. Dunne, bill repairs		15 00
1869.				
June	5.	" Chronicle & Sentinel		50 00
	"	" tax on sales, 23,691; C. B. Day, auctioneer, 25		256 91
	10.	" Constitutionalist bill		43 50
July	7.	" stamp C. & A. R. R. scrip		1 00
Sept.	22.	" expense J. O. Cook & Bro		31 50
	25.	" Savannah Advertiser		56 00
	"	" 6% stamp		3 50
Oct.	1.	" Cincinnati Enquirer		81 00
	"	" Journal Commerce		96 00
	"	" Atlanta Intelligencer		21 00
	"	" Chronicle & Sentinel		41 75
Dec.	17.	" State & co. tax for 1868		136 00
	"	" " " " 1869		140 00
	31.	" dividend p'd as p'r list		22,126 80
	"	" commiss'n on receipts, 59,541, 2½		1,488 53
	"	" " disbursements, 27,102.24, 2½		677 56
		" balance		32,551 00
				61,819 91
E. & O. E., by balance			32,551 58	

EXHIBIT F.

Dividend paid on Union Bank notes.

1869.							
June	12.	Dividend paid Harvey Terry,	6% on	1,544 75		92 68	
	14.	" " J. Leffingwell,	" "	75,000		4,500 00	
	"	" " J. J. Cohen & Sons.	" "	2,399		143 94	
	"	" " S. G. Barrett,	" "	3,758		225 48	
	15.	" " H. W. Carr,	" "	2,308		138 48	
	17.	" " L. J. Smith,	" "	3,905		234 30	
	"	" " Jas. M. Roberts,	" "	2,200		132 00	
	19.	" " J. W. Stoy, sr.,	" "	12,517		751 02	
	22.	" " Branch Sons & Co.,	" "	30,664		1,839 84	
	24.	" " James Sumevan,	" "	110		6 60	
	25.	" " Jas. Myers,	" "	553		33 18	
July	5.	" " B. B. Russell,	" "	100		6 00	
	14.	" " J. O. Force,	" "	510		30 60	
	15.	" " P. S. Marsh,	" "	771		46 20	
79 July	17.	Dividend paid J. L. Jones,	6% on	60		3 60	
	23.	" " Geo. D. Mills,	" "	175 00		1,050 00	
"	"	" H. W. Can,	" "	148 70		8 92	
	26.	" " L. Morris,	" "	1,611		96 66	
	28.	" " J. O. Mathewson,	" "	3,000		180 00	
	"	" " L. Kohn,	" "	780		46 80	
	"	" " Haskell & Co.,	" "	463		27 78	
	"	" " E. G. Mases,	" "	230		13 80	
	"	" " Jas. M. Francisco,	" "	260		15 60	

Aug.	2.	Dividend paid	W. F. Herring,	6 % on	66,765		4,005 90
	9.	" "	Wm. Dougherty,	" "	26,501		1,590 06
	11.	" "	Branch, Sons & Co.,	" "	2,164		129 84
	13.	" "	J. J. Cohen & Sons,	" "	1,415	75	84 95
	24.	" "	Branch, Sons & Co.,	" "	10,000		600 00
Sept.	23.	" "	A. Boggs,	" "	560		33 60
	25.	" "	Underwood & Rowell,	" "	528		31 68
1869.							
Oct.	18.	" "	A. Boggs,	" "	311		18 66
	19.	" "	Branch, Sons & Co.,	" "	3,055		183 30
	23.	" "	A. Boggs,	" "	210		12 60
Nov.	5.	" "	" "	" "	1,050		63 00
Dec.	3.	" "	R. G Jones,	" "	50		3 00
	8.	" "	J. G. Cohen,	" "	435		26 10
	20.	" "	Mrs. M. Harris,	" "	1,000		60 00
	"	" "	H. W. Pirley,	" "	12,640		758 40
	30.	" "	J. J. Cohen & Sons,	" "	1,253		75 18
	31.	" "	A. Boggs,	" "	763		45 78
	"	" "	Geo. A. Allen,	" "	105		6 30
	"	" "	W. M. & R. J. Lowry,	" "	1,766		105 96
	"	" "	A. Boggs,	" "	5,023		301 38
	"	" "	G. P. Curry,	" "	27,341	50	1,640 49
	"	" "	R. H. Clowes,	" "	288		13 68
	"	" "	A. Boggs,	" "	386	75	23 20
	"	" "	R. H. Clowes,	" "	63		3 78
	"	" "	G. P. Curry,	" "	429		25 74
	"	" "	J. A. North,	" "	44,344	75	2,660 68
					$368,780	20	$22,126 80

E. & O. E.

80 MILES G. DOBBINS
vs.
THE UNION BANK, &C.

Ordered that the notes on which the above verdicts are founded be impounded and made special deposits by the clerk in the National Bank of Augusta, subject to the order of the clerk of this court.

W. M. & R. J. LOWRY
vs.
THE UNION BANK, &C.

AUGUSTA, GA., *July 30th*, 1870.

E. M. BRAYTON,
Clerk Richmond Superior Court:

You are hereby directed to enter dismissed all the suits now pending in Richmond superior court brought by me against The Union Bank, or any stockholders thereof, to charge him as liable for the redemption of the bills of said bank.

WM. DOUGHERTY,
Plff.'s Atty.

In conformity with the foregoing order the above cases have been dismissed and stricken from the docket.

E. M. BRAYTON, *Clerk.*

81 STATE OF GEORGIA,
Richmond County:

I, S. H. Crump, deputy clerk of Richmond superior court, do hereby certify that the foregoing twenty-five pages, together with the accompanying twenty-two pages (certified to by Good Bryan, deputy clerk of

said court, on the 2nd day of March, 1874,) is a correct transcript of the record in the case of Miles G. Dobbins, &c., vs. The Union Bank of Augusta, lately pending in said superior court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this 28th day of October, 1874.

{ SUPERIOR COURT } { RICHMOND. }

S. H. CRUMP,
D. Clerk S. C. R. C., Ga.

Cost of copy answer & exhibits belonging thereto, certificate, & seal, 10.00.

S. H. CRUMP,
D. Clerk S. C. R. C., Ga.

82 (Endorsed on back:) Miles G. Dobbins vs. The Union Bank. Copy of record. In the superior court of Richmond County, Georgia. Exhibit A in case of Harvey Terry vs. Thomas W. Coskery, in the U. S. circuit court for the southern district of Georgia.

The plaintiff then introduced the following certified copy of the last return of the Union Bank of Augusta, made to the governer of Georgia, of a statement of its assets and liabilities and stockholders, as follows:

Statement of the condition of the Union Bank of Georgia, at Augusta, and its agency at Columbus, on Tuesday, June 23d, 1863, made to the governer of Georgia.

Liabilities.

Capital stock		300,000
Circulation		730,282
Deposits		1,342,800 94
83 Due to other banks & agents		84,202 30
Certificate of deposit		6,754 38
Dividends unclaimed		6,730
Reserved fund, exchange, disct., & interest		206,444 26
Total liabilities		2,677,213 88

Assets.

Notes discounted		338,370 95
Special loans		122,624 99
Exchange maturing		95,139 30
Do., past due & in judgment, (all good)		18,143 90
Due from other banks & agents		641,642 59
State of Georgia treasury notes	65,680	
" " " bonds	89,950	
Confederate States "	164,266 35	
" treasury notes	921,000 06	
		1,240,896 41
Notes of other banks		18,940
Specie in vault, (silver)		9,867 96
Stocks and bonds		179,583 65
Real estate		10,000
Expenses & protest accts.		2,004 13
Total assets		$2,677,213 88

List of stockholders in the Union Bank, Augusta, Geo., Tuesday, June 23rd, 1863.

		Shares.
	Atkinson, Chr	30
	Agts. Theological Semy., Columbia, S. C	20
	Alexander, W. W	20
	Barrett, Thos. G	12
84	Barrett, Wm. H	12
	Barrett, Jas. H	12
	Butler, Neh. K., & Co	1
	Butler, N. K	19
	" " " trustee of Mrs. Ama L. Wagner	1
	Brahe. Fredk. A	15
	Boulet, David S	27
	Boulet, Peter D	17
	Baker, Chas., trustee of M. C. Baker	12
	Blackman & Co	15
	Clark, Robt., guard'n	20
	Clark, David W	10
	Craig, Jno	100
	Calderbank, N. C	15
	Clemence, Beulah O	1
	Caskery, Thos. W	156
	Dortic, Germain S	200
	Dortic, Henry S	6
	Dugas, L. A., trustee of H. A. Rossignot	13
	Daniel, W. C., Rev. C. S	104
	Decottes, A. C., cash'r	140
	Eve, Jno. P., trustee of Mary O. Eve	17
	Evers, Henry	24
	Ford, Lewis D	56
	Foster, John	15
	Gould, Harriet G	17
	Gould, H. G., guard'n C. G. Gould	9
	Gould, Henry C	8
	Gallaher, M., guard'n J. H. Gallaher	10
	Hunter, Wm., trustee of Mrs. Julia S. Hunter	14
	Hall, Chas., trustee of Margt. Hall	14
85	Holmes, W. A	15
	Hoops, Henry H	5
	Harker, Edwn. W	25
	Herns, Arnold J. D	5
	Jackson, W. E	300
	Jackson, Andrew M	50
	Jackson, John K	50
	Jackson, John K., tr. of B. F. Verdry & children	15
	Jackson, Geo. T	150
	Jones, W. S., trustee of A. M. Griffin	19
	Jones, Edwn. S., trustee of Eliza V. Cartlege	10
	Jackson, W. E., ex. est. of A. I. Miller	20
	Jenkins, Chas. I., trustee of Valg. Burroughs & children	16
	Kuner, Isabella	2
	Miller, Thos. W., trustee of Mrs. Ann S. Davis	12
	Miller, Marther B	20

	Miller, Jno. T	63
	Miller, Jno. T., guard'n Julia F. Miller	11
	Miller, Jno. T., trustee of Mary E. Miller	12
	Miller, Jno. T., trustee of R. E. Miller	11
	Miller, Frank H	30
	Miller, F. H., trustee of Howell Clanard	10
	Miller, Edwd. T	10
	Miller, Mary E	13
	Miller, Ethelbirt O	21
	Milligan, Jos	20
	McKema, Thos. C	35
	Mevenacke, John I. C	15
	Newman, John I	4
	Porter, Oliver S	13
	Ramsey & La Barr	2
86	Royal, Wm. S	20
	Roberts, Thos. H	50
	Roberts, Wm. S	73
	Reid, Robt. A	14
	Sweeney, Thos	12
	Snowden, Thos	12
	Seixas, D. C	21
	Stovall, M. P	100
	Sargent, P. P	13
	Summerall, Wm	10
	Sutt, Benj. F., trustee of P. Seistrunk	10
	Thew, George M	30
	Thomas, Edwd	450
	Wilkinson, H., guard'n	12
	Wilkinson, H	2
	Wright, D. R	20
	Total number of shares	3,000

Board directors.—Edward Thomas, prest.; William E. Jackson, G. T. Dortic, Jno. K. Jackson, John Craig, cashier.

STATE OF GEORGIA,
Richmond County:

Before me, Benj. B. Russell, not. pub. in and for said county, personally appeared Edward Thomas, president, and John Craig, cash., of the Union Bank of Augusta, Ga., who, being sworn, say that
87 the foregoing is a just and true statement of the condition of said bank, to the best of their knowledge and belief. And these deponents do further say that so far as they know and believe this bank, of which they are officers, have not by itself, its officers or agents, knowingly or intentionally in any particular violated any of the provisions of an act passed the 22nd Dec., 1857, entitled "An act to provide against the forfeiture of the several bank-charters in this State on account of non-specie payment for a given time, and for other purposes therein mentioned," as amended by acts of 1860 & 1861.

EWD. THOMAS, *Prest.*
JNO. CRAIG, *Cashr.*

Sworn to and subscribed before me this 9th day of July, 1863.

B. B. RUSSEL,
Not. Pub., R. C.

EXECUTIVE DEPARTMENT, STATE OF GEORGIA,
Atlanta, Ga., Feb. 16th, 1874.

I hereby certify that the foregoing five pages contain a correct copy of a return of the Union Bank of Georgia, &c., (Augusta, Georgia,) dated June 23rd, 1863, now of file in this department.

88 [SEAL.] J. B. CAMPBELL,
Sec. Ex. Dept.

And the following exhibit: "For value received I do hereby assign, sell, and set over to Harvey Terry, of Columbia, S. Carolina, and to his heirs and assigns forever, all my rights, title, interests, property, claim, and demand in and to all of the bank-notes of the Union Bank of Augusta, Georgia, deposited by me with John Craig, esq., assignee of said bank, for pro rata dividend out of the assets of said bank, (amount of said notes so deposited, about $3,000,) upon which notes fifteen per cent. has been paid, and all of the rights, property, interest, claim, and demands whatever that remains due to me and unpaid upon the same in any manner, and do transfer all my legal rights, remedies, interests, property, claims, and demands unto said Harvey Terry, and to his heirs and assigns forever, to have, hold, keep, possess, own, and enjoy the same as fully as I could do, hereby giving and granting to said Harvey Terry all my power, strength, and authority to do all things requisite and necessary in the premises.

89 In witness whereof I have hereunto set my hand and seal this 21st day of June, 1873.

J. O. MATHEWSON. [L. S.]

The plaintiff then introduced the bank-notes of the Union Bank of Augusta, amounting to eight thousand four hundred and forty-five dollars, dated September, 1854, payable on demand to the bearer, signed by John Craig, cashier, and Edward Thomas, president, or Wm. E. Jackson, president, with certificate of protest duly made on the 10th day of July, 1872, thereto in due form attached, being admitted by defendant's counsel as the vouchers referred to in Schedule C, in plaintiff's petition.

And the deed of assignment of said Union Bank to John Craig, and Chs. A. Rowland, dated February 24th, 1866, that the circulation of said bank existed as charged, and that the defendant was the holder of 156 shares of the stock of said bank. Admitted by defendant.

Then comes defendant's counsel and introduces the commission and interrogatories and testimony of Frank H. Miller and Wm. E.
90 Jackson, taken under said commission on behalf of said defendant.

1st interrogatory to both witnesses. Do you know the parties, and where do they reside?

2nd interrogatory to both witnesses. Were you acquainted with the affairs of the Union Bank, a banking corporation of said State, located in Augusta? *I*s so, state what was the condition of said bank on and always after the 31st day of May, 1865, as to solvency; and was or was not that condition notorious or generally known to the public?

3rd interrogatory to both. When did said bank finally cease to do business as a bank, and to have a place of business? When did it finally stop payment of its bills? When did the bills of said bank cease to circulate as money? Was it before or after the 31st day of

May, 1865? And have they or not circulated as money at any time since that date? If they have, state when.

4th interrogatory to both. Did or not said Union Bank issue any of its own bills after May 31st, 1865? If so, what amount was
91 issued after that date?

5th interrogatory to both. State anything in your knowledge material to the case as if specially interrogated thereto.

W. H. HULL,
Deft.'s Atty.

Cross-interrogatories to both:

1st. Did or did not the Union Bank of Augusta continue to collect its debts and to redeem its bank-notes outstanding until on or about the 24th day of February, 1866, the date of the assignment of the bank? If said bank ceased entirely to do business before that date, state the exact date that it ceased to transact business.

2d cross-interrogatory to both. Did not said Union Bank or its officers continue to redeem its outstanding notes at some rate or price after the 1st day of June, 1865?

3rd cross-interrogatory to both. Was any of the bank-notes of said Union Bank protested for non-payment at any time previous to the 24th day of February, 1866; and, if so, by whom was the protest
92 made, and what was the date upon which said protest was made, and what amount of said bank-notes were so protested, and were they redeemed by the bank after protest?

HARVEY TERRY,
Plaintiff per se.

Interrogatories to Frank H. Miller & answers.

FRANK H. MILLER, aged 38 years, being duly sworn, answers and deposes as follows, to wit:

To 1st interrogatory the witness answering saith: I know the defendant personally, and Harvey Terry, by reason of correspondence with him. I reside in the village of Summerville, near Augusta, Georgia.

To 2nd interrogatory: I was a stockholder and depositor until after the failure of the bank. On the 31st day of May, 1865, the bank was hopelessly insolvent. That condition was notorious and generally known to the public.

To 3rd interrogatory: The bank ceased to do business with the fall of the confederate gover'ment, May, 1865. It had its banking-house
93 and assetts, but transacted *on* business as a bank after that date. The bank stop'ed payment of its bills at its counter, with the fall of the confederate gover'ment, in May, 1865. The bills ceased to circulate in May, 1865, and prior to May 31st. They have not circulated as money from hand to hand since that time. They have, of course, been the subject of barter and sale, but not taken as money.

To 4th interrogatory: None to my knowledge.

To 5th interrogatory: After the death of John H. Jackson, esq., the regular attorney of the bank, Feb'y 27th, 1866, I was employed as counsel for the assignees in certain matters requiring legal advice. I know that the assignees, under a decree of Richmond superior court, of June 23rd, 1870, in the case of Miles G. Dobbins et al. against them, paid out the dividen's to the creditors who had given notice and been made parties, of whom plaintiff was one; and that I, in person, remitted to Har-

vey Terry, Oct. 10th, 1870, one hundred and thirty-nine dollars, being the final dividend of nine per cent. on $1,544.75, all of the notes then owned by him. That this remittance was the result of the correspondence had, as shown by his letters, dated Oct. 8 and 12, 1870. I
94 know further that a dividend was paid to J. O. Mathewson, August 19th, 1870, of two hundred and seventy dollars on the bills then held by him, and that the evidences of debt were surrendered to the assignees as shown by the original receipt taken, hereto annexed marked "C."

Cross-interrogatories—Frank H. Miller:

To 1st cross-interrogatory, answer: The bank continued, as far as practicable, to collect its assetts, but did no business, and paid no bills, and redeemed no notes. The banking-house was rented to John Craig, as an individual, who carried on business there as a banker and broker. It ceased to transact business as a bank in May, 1865, and prior to June 1, 1865.

To 2nd cross-interrogatory, answer: Have never been informed that it did, and do not believe that it ever did. Have heard an arrangement was made by the assignees, in 1867, to exchange some sixteen Greenville and Columbia R. R. bonds, for $1,000 each, for seventy-five thousand dollars of their bills, under advice of a committee appointed
95 at the meeting of stockholders, when the assignment was ordered to be made. But I know of no such payment; this action of the assignees was ratified in the decree of June 23rd, 1870, to which Terry was a party.

To 3d cross-interrogatory, answer: Have never to my knowledge.

FRANK H. MILLER.

Interrogatories to Wm. E. Jackson & answers.

WM. E. JACKSON, aged 59 years, being duly sworn, answers and deposes as follows, to wit:

To 1st interrogatory the witness answering saith: I know the defendant, T. W. Coskery, personally. Harvey Terry, the plaintiff, I am not acquainted with. I reside in the city of Augusta.

To 2nd interrogatory, answer: I was a stockholder in the Union Bank on the 31st day of May, 1865; the bank was hopelessly insolvent. That condition was notorious and generally known to the public.
96 To 3rd interrogatory: The bank ceased to do business with the fall of the confederate gover'ment, May, 1865. It had its banking-house and assetts, but transacted no business as a bank after that date. The bank stopped payment of its bills at its counter with the fall of the confederate gover'ment in May, 1865. The bills ceased to circulate as money in May, 1865, and prior to May 31st. They have not circulated as money from hand to hand since that time. They have, of course, been the subject of barter and sale, but not taken as money.

To 4th interrogatory. None to my knowledge.

To 5th interrogatory. I know of nothing further material to the case.

Cross-interrogatories. Wm. E. Jackson.

To 1st cross-interrogatory. Answer. The bank continued, as far as practicable, to collect its assetts, but did no business and paid no
97 bills, and redeemed no notes. The banking-house was rented to

John Craig as an individual, who carried on business there as a banker and broker. It ceased to transact business as a bank in May, 1865, and prior to June 1st, 1865.

To 2nd cross-interrogatory. Answer. Have never been informed that it did, and do not believe it ever did.

To 3rd cross-interrogatory. Answer. Never to my knowledge.

WM. E. JACKSON.

After full argument the case was submitted to the court, and after consideration the court ruled that the above action was barred by act of March 16th, 1869, as plead by the defendant in this cause as a statute of limitations; to which ruling and decission of the court, as aforesaid, plaintiff, at the time said ruling was made by the court, then an' there excepted thereto and filed exceptions. The court then entered final judgment, upon said pleas, for the defendant.

98 To preserve all which matters and things of record in this cause, plaintiff moves the court that his bill of exceptions, taken during the trial of this cause, be signed and sealed by the court, and made a part of the record herein during the progress of said trial; which is done accordingly.

W. B. WOODS, [L. S.]
Judge.

(Endorsed on back:) United States of America. Southern dist. of Georgia. In the U. S. circuit court. Harvey Terry vs. Thos. W. Coskery. Debt. Exceptions of plaintiff. Filed, Jany. , 1877. Jas. McPherson, clerk. Service of notice of the within bill of exception acknowledged & furthur service waived. Jany. 9th, 1877. Wm. H. Hull, dft.'s atty. Terry, pro se.

99 And afterwards, to wit, on the same eight' day of January, A. D. 1877, a writ of error was issued out of the said court in the said cause, as follows:

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of Georgia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Harvey Terry as plaintiff and Thomas W. Coskery as defendant, a manifest error hath happened, to the great damage
100 of the said Harvey Terry, as by his complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause fur-

ther to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the eighth day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

[L. S.] JAS. McPHERSON,
Clerk U. S. Circuit Court.

Allowed by—

W. B. WOODS,
U. S. Circuit Judge.

101 And afterwards, to wit, on the 8th day of January, A. D. 1877, citation issued out of said court, directed to the said defendant, as follows:

Citation.

UNITED STATES OF AMERICA, *ss:*

To Thomas W. Coskery and his certain attorney, Wm. H. Hull, esq., Augusta, Geo., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the southern district of Georgia, at Savannah, wherein Harvey Terry is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of Savannah, Georgia, in the southern district of Georgia, this 8 day of January, 1877.

W. B. WOODS, [SEAL.]
U. S. Circuit Judge.

102 Service acknowledged January 8th, 1877.

W. H. HULL,
Dft.'s Atty.

Clerk's certificate.

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, James McPherson, clerk of *clerk of* the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that the foregoing one hundred and two pages (102) of writing contain a full, true, and complete transcript of the record of the pleadings, proceedings, bill of exceptions, writ of error, &c., in the cause of Harvey Terry against Thomas W. Coskery as the same remain on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court at Savannah, in said district, this the thirtieth day of January, in the year of our Lord eighteen hundred and seventy-seven, and of American Independence the one hundred and first.

[SEAL.] JAS. MCPHERSON,
Clerk.

(Indorsement on cover:) No. 993. Harvey Terry, plaintiff in error, vs. Thomas M. Coskery. S. Georgia C. C. U. S. Filed 22nd February, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1876. 993.

Argued with 266.

HARVEY TERRY,
Plaintiff in Error,
vs.
THOMAS W. COSKERY,
Defendant in Error.

Oct Term 1877.

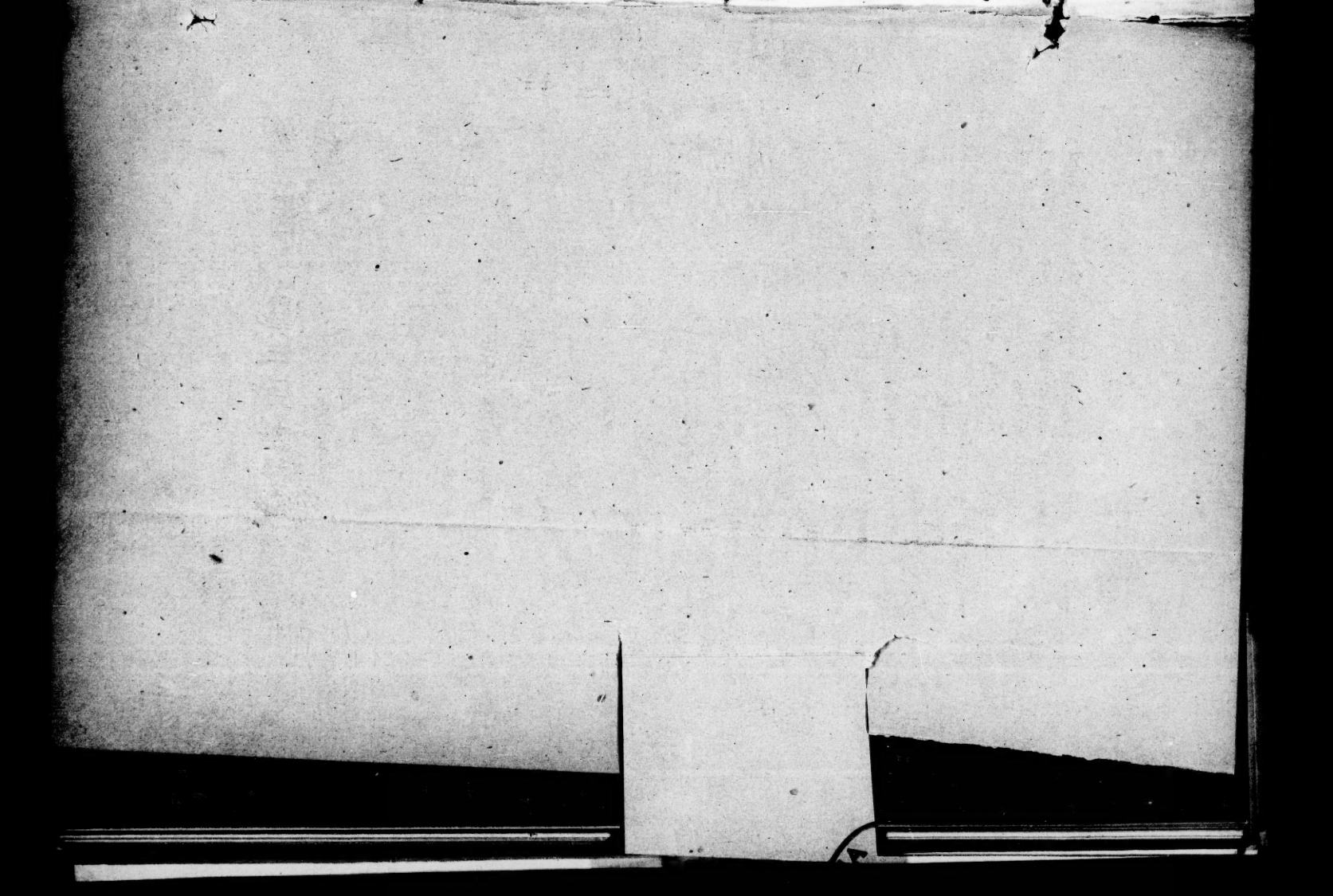
BRIEF OF PLAINTIFF IN ERROR. No 39.

PHILADELPHIA BAR ASSOCIATION

In Error to the Circuit Court of the United States for the Southern District of Georgia.

HARVEY TERRY,
Plaintiff.

R. O. POLKINHORN, Printer, 632 D St., N. W.



Supreme Court of the United States.

OCTOBER TERM, 1876.

HARVEY TERRY, *Plaintiff in Error,*
vs.
THOMAS W. COSKERY, *Deft. in Error.*

Brief of Plaintiff in Error.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

The defendant in error obtained a judgment against the plaintiff in error, in the Circuit Court of the United States for the Southern District of Georgia, in a suit founded upon two judgments against the Union Bank of Augusta, Georgia, and the assignees of the Union Bank of Augusta, Georgia, rendered June 23, 1870 (one judgment for $1,544.75, and the other judgment for $3,000, both of said judgments being founded upon the bank bills of said Union Bank, deposited in the hands of said assignees and impounded in the hands of said assignees) in the cause of Miles G. Dobbins *et al. vs.* John Craig and Chas. A. Rowland, assignees of the said Union Bank of Augusta, (see Record, folios 78, 79 and 80) for four thousand five hundred and forty-four $\frac{75}{100}$ dollars, and eight thousand four hundred and forty-five dollars of the bank notes (folio 89) of said Union Bank, of Augusta, Georgia, as in the plaintiff's petition set out; upon the plea that the statute enacted by the Legislature of

Georgia, approved March 16, 1869, entitled, "An Act in relation to the Statutes of Limitations, and for other purposes," applied as a bar in said suit to relieve the defendant in error from the statutory liability under the charter of said bank, as a stockholder, to pay and redeem the debts or any part of the debts of said bank, incurred under said charter; to which plea of defence petitioner replied, that the said act of March 16, 1869, did not apply to bar his said suit, and could not apply to bar his said suit in said action, for said act, if applied as plead, destroyed a right of action of the petitioner that existed at the date of the issue of the bank bills, for twenty years, and that existed for twenty years from the date of the failure of the bank, to make collection of said debt; and gave a defence to the defendant that did not exist at the date of the issue of the bills, and did not exist at the failure of the bank; and that said act was unconstitutional and void as a bar, yet petititioner's replications were overruled by the Court, and judgment erroneously entered in the cause for the defendant.

The plaintiff in error filed his petition on the 23d day of December, 1874, claiming payment upon the balance due on said judgments, after crediting thereon the pro rata share of the assets of said bank; the balance amounting to $3,864, with interest from the 23d day of June, 1870; and also claiming payment upon $8,545 of the bank bills of the Union Bank of Augusta, with interest from the 10th day of July, 1872, from said defendant in error, as a stockholder and owner of 156 shares; and setting out the charter of said bank, and that said bank was regularly organized and operated under said charter, with a capital of $300,000, divided into shares of $100 each share; that said bank made and put in circulation as money its bank bills to a large amount, and had at the date of filing of said petition then outstanding and

unpaid seven hundred and thirty thousand dollars of said bank bills; and that said petitioner, after said bank bills were so issued and circulated as money, and intended to be used and circulated as money during the existence of said bank charter, and not being dishonored, and before demand of payment thereof, plaintiff became the holder and owner, for value, of said bank bills sued on, as set out and described in the petition; and that said bank's charter now remains in force, and exists until the year 1880.

That said bank on the 24th day of February, 1866, assigned all of its property and assets for the payment of its debts in the redemption of its bills, and that the property and assets of said corporation, when duly administered, did not pay said indebtedness, as aforesaid, but only reduced the indebtedness of said bank the sum of $44,000; and that a credit of said forty-four thousand dollars has been deducted from the outstanding issues of said bank, leaving an outstanding circulation of $686,000, after the application of the assets assigned by said bank was made in payment thereon.

That by said statute of incorporation it was enacted, (Princess' Digest Laws of Georgia, page 117, sec. VII): All amounts of stock subscribed for shall be paid in specie at the time of subscribing; and that the said corporation shall not at any time suspend or refuse payment in gold or silver of any of its notes, bills, or obligations; and if the said corporation shall at any time refuse or neglect to pay, on demand, any bill, note, or obligation, issued by the corporation, according to contract, promise, or understanding therein expressed, the charter hereby granted shall be forfeited. * * * * &c.

SEC. VIII. The bank, * * * with banking privileges, shall be permitted, and is hereby authorized, to issue bills or notes of credit, payable to bearer on demand,

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That said bank on the 24th day of February, 1866, assigned all of its property and assets for the payment of its debts in the redemption of its bills, and that the property and assets of said corporation, when duly administered, did not pay said indebtedness, as aforesaid, but only reduced the indebtedness of said bank the sum of $44,000; and that a credit of said forty-four thousand dollars has been deducted from the outstanding issues of said bank, leaving an outstanding circulation of $686,-000, after the application of the assets assigned by said bank was made in payment thereon.

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SEC. VIII. The bank, * * * with banking privileges, shall be permitted, and is hereby authorized, to issue bills or notes of credit, payable to bearer on demand,

signed by the president and countersigned by the cashier; but the total amount of debts which the said corporation shall at any time owe, whether by bond, bill, or note, or other contract, shall not exceed three times the amount of the capitol stock actually paid in.

SEC. IX. The persons and property of the stockholders in the bank * * * * with banking privileges, shall at all times be pledged and bound in proportion to the number of dollars issued upon each of the shares that each individual or company hold, possess, are interested in, or intitled to in the said Union Bank, for the payment and discharge of the debts or contracts of said bank, or for the ultimate redemption of all notes and bills issued, or that may hereafter be issued, by and from the said bank with banking powers and privileges, in the same manner as in simple actions of debt or common commercial cases, as by the record of said act here in court at large appears; wherefore and in consideration whereof, and by force of said statutory liability, heretofore recited and referred to, said defendant became indebted to, and is liable to pay to said plaintiff, on account of said indebtedness, the sum of $3,864, with interest from 23d day of June 1870, and the sum of $7,657, with interest from the 10th day of July 1872, and the sum of $788 with interest from the date of this suit, and the cost of this proceeding.

The defendant in error comes into court upon the plea of the statute of limitations, and pleads in bar of said suit as follows:

1. And the said defendant comes and defends the wrong and injury when, etc., and for plea and answer says, that he does not owe the said sum of money above demanded or any part thereof in manner and in form as said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, etc.

2. And for further plea this defendant saith, as to said supposed cause of action in the declaration mentioned; that the plaintiff ought not to have and maintain his said suit against him, because he says all of said bills on which said suit is founded were issued prior to the 31st day of May 1865, and none of them since that date; and from said day to the present time, said Union Bank has entirely stopped payment, ceased to do business and to have any place of business, and has been notoriously insolvent, and said bills have not since said 31st day of May 1865, circulated or been used as money, and on that date, and ever since this defendant held the same stock in said bank that he now holds.

Wheretore defendant saith, that no liability on his part on account of said bills, nor any right of action of plaintiff therefor, has accrued since said 31st day of May 1865. And he pleads the act of March 16, 1869, in relation to the statute of limitation in bar of the present proceedings.

3. And for further plea in this behalf the defendant saith as to the said supposed causes of action in the declaration mentioned, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith, that the said supposed causes of action in said declaration mentioned, did not nor did either of them, accrue to the plaintiff at any time since the 31st day of May 1865; that the same, if ever, arose prior to June 1, 1865; that since June 1, 1865, none of the bank notes in the declaration mentioned were issued by the Union Bank, and that by a failure to institute suit thereon by January 1, 1870, as required by act of the General Assembly of Georgia, approved March 16, 1869, the right of the plaintiff was forever barred.

And this defendant is ready to verify.

Replication.

To which plea plaintiff made replication as follows: That upon that part of plaintiff's claim founded upon the bank notes filed with the assignees for *pro rata* dividends out of the assets of said bank and impounded by said assignees, a court of competent jurisdiction did adjudicate the rights and pass upon the validity of said bank notes of this plaintiff and his assignees, and on the 23d day of June, 1870, did enter judgment thereon in favor of said Harvey Terry and J. O. Mathewson, his assignee, for the sum of $1,545.75 and $3.000, and therefore said sums of money are not, and cannon be, affected by the statute of limitations of the State of Georgia, dated March 16, 1869, and whereon plaintiff prays judgment for $3,864, with interest from the 23d day of June, 1870. And for a further replication the plaintiff says: "that the plaintiff's claim founded upon that part of the bank notes of said Union Bank, as shown in schedule "C," amounting to $8,445, were duly issued and circulated as money payable to the bearer, assignable by delivery, outstanding and unpaid in the hands of the holders for value, whose rights had attached thereto, and therein, before the 31st day of May, 1865; that the said right to pay out said bank notes under the charter of said bank was a contract of said bank running into the hands of the bearer of said bank notes for circulation and redemption until the expiration of the charter of said bank, which said right and contract attached at the issuing of the bill, which rights no power vested in the General Assembly of the State of Georgia could abrogate by statute after said bank notes were legally circulated for value under said charter."

That this plaintiff is a non-resident of the State of Georgia, and is not bound by the laws of the General Assembly of the State of Georgia abrogating contracts already attached without the limits of said State, and he

therefore answers that the act of March 16th, 1869, in relation to the statute of limitations in bar of the present proceeding *is void.*

That the plaintiff, as the bearer of $8,445 of the bank notes enumerated in schedule " C," acquired without the limits of the State of Georgia, and that a failure to institute suit thereon before the 1st day of January, 1870, does not constitute any bar to said action, nor to any part of said action.

That said act of March 16, 1869, in relation to the statutes of limitations, does not apply, and ought not to apply in bar of the present action upon said $8,445 of said bank notes, because the ultimate liability of said Thomas W. Coskery, to pay the debts of said Union Bank had not attached until after the first day of January, 1870; and the bank notes of said Union Bank did not come into the possession of the plaintiff until after Januray 1st, 1871, and if therefore assignable by delivery they cannot be barred in his hands by said act.

That the act of the Legislature of Georgia, dated March 16th, 1869, plead in this cause, is unconstitutional and void as a bar to plaintiff's suit; that said act if applied as plead in this cause, takes away a right of action and destroys a remedy that existed for the collection of the bank bills and judgments sued on by the plaintiff against the defendant at the date of the issue of said band notes, and that existed at the date of the failure of said bank.

And said act, if applied as plead in this cause, gives a defence to the defendant that did not exist at the date of the issue of the bank notes sued on in this suit, nor did not exist at the date of the failure of said bank.

Pleas of the Statute of Limitations Sustained.

And afterwards, to wit, on the 5th day of January, 1877, before the judges of said court, came the plaintiff

in proper personam, and the defendant also comes by W. H. Hull, his attorney, and by consent of parties it is ordered that said cause be submitted to the court upon the law and facts, with depositions, with liberty to either party to except and have writ of error.

The above case having been submitted to the court upon the law and the facts, and after argument had, it is ordered that the pleas of the defendant be sustained, and that judgment with costs of suit be rendered for defendant, to be taxed by the clerk; and judgment for the defendant was entered.

A copy of the act of the Legislature of Georgia referred to.

"AN ACT PASSED BY THE ASSEMBLY OF GEORGIA IN MARCH, 1869, ENTITLED,

"*An act in relation to the Statute of Limitations, and for other purposes.*"

"*Whereas*, such confusion has grown out of the distracted condition of affairs during the late war; and whereas doubts are entertained relative to the law of limitation of accounts in this State, which should be put to rest."

"SEC. 1. *Be it therefore enacted* by the General Assembly of Georgia, that all acts of the Legislature of this State, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, which are retroactive in their character relative to the Statute of Limitations, shall be held by the courts of this State to be null and void in all cases in which the statute had fully run before the passage of said retroactive legislation.

"SEC. 2 *And be it further enacted*, That all suits upon judgments obtained outside of this State prior to

June 1st, 1865, not now barred, and all writs of *scire facias* to revive any judgment obtained in this State, which is now dormant, shall be brought by 1st January, 1870, or both the right of action and the remedy shall be forever barred.

"SEC. 3. *And be it further enacted*, That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights according to individuals, or corporations, under the statute or acts of incorporation, or in any way by operation of law which accrued prior to 1st of June, 1865, not now barred, shall be brought by 1st of January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred.

"SEC. 4. *And be it further enacted*, That all actions on promissory notes, bills of exchange, or other simple contracts in writing, and all actions on open accounts, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, which accrued on a contract which was made prior to June 1st, 1865, not now barred, shall be brought by 1st January next, after the passage of this act, or the right of the party, plaintiff, or claimant, and all right of action for its enforcement shall be forever barred.

"SEC. 5. *And be it further enacted*, That all actions against executors, administrators, guardians, or trustees, which occured prior to 1st of June, 1865, or which are predicated upon any alleged neglect or misconduct of any such executor, administrator, guardian or trustee, in the investment of trust funds in currency, bonds or the like, without any order of court or other sufficient authority, or in the management of any trust estate, which occurred prior to the 1st of June, 1865; or when the management or investment was made prior to that date,

shall be brought by 1st January, 1870, if not already barred, and not after, and the right of action shall be forever barred, if not brought within that time; *Provided*, That no executor, administrator, guardian or trustee shall have the benefit of this act who has acted fraudulently and corruptly in the management of the trust estate.

"SEC. 6. *And be it further enacted*, That all other actions upon contracts, expressed or implied, or upon any debt or liability whatsoever, due the public, or a corporation or a private individual, or individuals, which accrued prior to the 1st of June, 1865, and are not now barred, shall be brought by 1st January, 1870, or both the right and the right of action to enforce it shall be forever barred.

"All limitations hereinbefore expressed shall apply as well to Courts of Equity as Courts of Law, and the limitation shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to the 1st of June, 1865, or was then only *inchoate* and imperfect, if the contract or liability was then in existence.

"SEC. 7. *And be it further enacted*, That all actions for torts of any character whatever, when tort or wrong was committed, or the right of action accrued, or the injury was done, whether to the person or the property of any person or corporation, prior to the 1st of June, 1865, by any person then or now a citizen or inhabitant of this State, which is not now barred, shall be brought and prosecuted within three months from the passage of this act, or the right of action of the injured party or plaintiff in the action, as well as the right of such party to sue, shall be forever extinguished, barred, and foreclosed.

"SEC. 8. *And be it further enacted*, That all cases of the character mentioned in any section of this act which have arisen, or in which the right of action or the lia-

bility has accrued, or the contract has been made since the 1st of June, 1865, shall be controlled and governed by the limitation laws as set forth in the revised Code of Georgia, adopted by the new constitution of this State.

"SECTION 9. Repeals conflicting laws."

"Approved March 16, 1869."

Assignment of Errors.

1st. That the Circuit Court of the United States for the Southern District of Georgia erred in its judgment in holding that the act of the General Assembly of the State of Georgia approved March 16, 1869, entitled "An act in relation to the Statutes of Limitations, and for other purposes," was a bar to said suit, and was a valid and constitutional act, and thereupon dismissed the plaintiff's petition; whereas the said court should have held said act to be unconstitutional and void, as a bar to said suit, and as being repugnant to the Constitution (Art. 1, Sec. 10) of the United States, and as plead it was repugnant to the Constitution and laws of Georgia in existence when the plaintiff's right of action accrued and vested, and said court should have sustained said action.

2d. That under the Constitution and laws of Georgia, as they existed at the date of the issue of the bills, vouchers of the debt sued on; and as said Constitution and laws of Georgia existed at the time of the alleged failure of the bank, the plaintiff's right of action under the staute would not be barred before the expiration of twenty years; and the validity of said right of action is protected and maintained by the new Constitution of Georgia, adopted July, 1868, Art. 1, Secs. 26 and 32, and Art. XI, Secs. 4 and 5, and is also protected by the Code of Georgia, 1867, Sec. 2865, existing as statute law at the date of the passage of said act of March 16, 1869,

and under the statute of the charter of said bank *the right of action is given to the bearer of the bills* upon demand of payment of the bills and refusal of the payment thereof (to the then holder) by the corporation. The defendant's pleas and proofs in the cause failed to show that the plaintiff held any of the bank notes, or the judgments, vouchers in this action, before the 1st day of June, 1865, or that plaintiff held any of the bank bills, vouchers in this suit, before the assignment of said bank, or that said bills had been demanded, or any right of action had accrued under the statute to the bearer before the 1st day of June, 1865; and it was error in the court to hold that the plaintiff's right of action in this cause came within the purview of the act of March 16, 1869; and it was error in the court to hold that plaintiff's right of action accrued to him and existed before he came in possession of the bills sued on, and that his right of action existed before the assignment of the bank; and that his right of action existed before the demand of the payment of the bills sued on had been made; and that his right of action was barred by act of March 16, 1869, as plead in the cause, as a repeal of said charter.

3d. That plaintiff's suit is founded upon the statute of incorporation of said Union Bank, and said statute should be construed strictly and fully according to the terms thereof, and that said statute of charter is not repealed, amended or abrogated by the subsequent enactment by the General Assembly of Georgia of the act of March 16, 1869; and plaintiff's right of action against the defendant exists under the said statute of incorporation, and does not exist under the common law, and the plaintiff's rights of action exist as fully and completely to make suit and collection under said statute of charter as though said act of March 16, 1869, had never been passed; and it was error in the said Circuit Court to hold that the right of action and the right of plaintiff to make collec-

tions in said suit were controlled by the common law or were controlled by the subsequent legislation of said State—by act of March 16, 1869—and that the rights of the plaintiff in said suit were barred by said act, without evidence in the cause to show that the plaintiff was a holder of the bills, or vouchers of debt, before June 1, 1865, or that the plaintiff had any right of action against the defendant before June 1, 1865, under the charter strictly construed.

4th. That the defendant's plea having admitted that plaintiff's right of action attached before the 1st day of June, 1865, it was error in the court to hold that plaintiff's suit was barred by said act of March 16, 1869, and that said subsequent legislation by said State did impair and did bar the rights vested in said suit, already attached under said charter, before the passage of the act.

Statement of Facts.

I.

That said Union Bank of Augusta was legally and duly organized, constituted, and operated under the laws of Georgia, and did not commit any act of bankruptcy or legal failure before the making of assignment, on the 24th day of February, 1866, and the bank bills sued on were all issued prior to the year 1865, paid out for value, and circulated as money, and intended to be used and circulated as money during the existence of said bank's charter, (to the year 1880,) unless the same should be presented and payment demanded at an earlier date. On the bank bills impounded by the assignees demand of payment was made in 1869; and on the 23d day of June, 1870, judgment was rendered thereon by a court and jury of competent jurisdiction, and subsequently payments made thereon by the assignees, in the year

1870, and the credits given by the plaintiff therefor on account of said bank notes and judgments. That the $8,445 bank bills (vouchers of the debt in this action) were outstanding, in circulation, unpaid, and existed without demand of payment or dishonor until July 10, 1872, as shown by the protest of said bills, thereto attached. (See Record, folio 89.)

II.

That the allegations set forth in plaintiff's petition that said Union Bank was duly and legally organized and operated under said charter, with a capital of $300,000, and issued its bank bills to the amount of $730,000, and existed as a bank until its assignment on the 24th day of February, 1866; and that the assets of said bank realized the sum of $44,000; and that the same has been applied in payment of the debts of said bank *pro rata*, and that all of the means and assets of said corporation was exhausted and applied to the payment of its debts, leaving an outstanding indebtedness for the bank bills in circulation of $686,000, for which debt the stockholders were individually liable for the proportionate part or number of dollars issued on each share of stock held by said stockholder, as alleged in the complaint, *stands uncontradicted and admitted to be true.*

That Thomas W. Coskery is the owner and holder of 156 shares, and that the proportionate part of said debt or ultimate liability due upon said 156 shares amounts to $35,672, and that the same is due and payable by the defendant. (See record, folio 12.)

III.

That the rights and property of the plaintiff in the bank notes sued on in this suit accrued to the plaintiff out of the State of Georgia, and exists only by virtue of the charter of said bank, in strict accordance with the

allegations made in plaintiff's petition (see record, fols. 9, 10 and 11); and plaintiff was not cognizant of the subsequent legislation of the General Assembly of Georgia, enacting said act of March 16, 1869, and was not bound by its terms beyond the limits of the State.

That the bills and notes impounded by the assignees (see Record, folio 80) were acquired antecedent to the passage of said act, and demand of payment, and suit for payment, was made previous to the passage of said act, and partial payment was made thereon by the assignees, and the credit for the said payments allowed subsequent to January 1, 1870.

That the $8,445 of bills were acquired without the State of Georgia before dishonor or demand of payment, subsequent to the year 1870, while said bills were in cirlation and exchangeable for value, as shown by defendant's evidence. (See Record, folios 93 and 96.) That said bank bills, at the date of their issue, and at the date of the failure of said bank, were regarded as a chose-in-possession, and had a validity superior to a common chose-in-action, to wit, bank bills were regarded as having the sanctity and validity of a sealed instrument, and were regarded as creatures of statute and not subject to the rules of common law in Georgia or to subsequent legislation by the same power that created them, after they had been circulated for value on the public.

That said act of the General Assembly of Georgia was retroactive and retrospective entirely, (except as to nine months and fifteen days of time,) and was intended to affect, and did affect, the rights of property under contract, and the rights of action then in existence under statute, and did not affect, and by its terms, was not intended to affect, the rights of contract or the rights of action under contracts to be made after its passage.

That said act did not include in its terms bank notes or the

right of action accruing under a statute law of the State described as a bank. That plaintiff's right of action on said bank bills, under the statute, existed for the period of twenty years, as a vested right under the constitution and laws of Georgia, and existed as a vested right under the constitution and laws of the United States, and were not subject to be affected by subsequent legislation of the State of Georgia after the right vested had attached; and if plaintiff's right of action had not vested before he obtained the bank bills, vouchers in this action, then his rights do not come within the purview of the act of 1869.

See Par 2, Page 11. Jerry's Brief 29
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Argument of Facts.

1 Your petitioner assumes that the incorporation of said Union Bank, and by the user of said corporate franchise of charter, by the stockholders as charged, is a trust upon condition. Said stockholders by the charter are granted an estate upon condition—that is to say, they are granted the right to form a body corporate, and to pay in as capital, the sum of $300,000 in specie, and for every dollar of gold paid in as capital, a right or an estate was granted, to issue three dollars of paper tokens (known as bank notes); and to circulate the same as money of actual value. And the stockholders of said Union Bank, did use the franchise of charter, and di d circulate the bank bills of said Union Bank into the hands of the public as money, to the amount of $730,000; and intended to use and circulate the same as money during the existence of said bank charter.

1 Sharswood's Blackstone, Book II, page 299, Note 5.

1 Spear S. Carolina, 516; State *vs.* Bank of S. C.

Princess' Digest Laws of Georgia, page 117 Sec. 8.

no promise or contract can be shown to exist between

said bank, an estate upon condition of $730,000. That said estate was created under the charter, for the profit, use, and advantage of the stockholders; and in order to secure the re-payment of this vast estate, or sum of promises to pay thus issued on the public, the General Assembly of Georgia, prefixed *a condition to the grant of said franchise*, to wit: that every holder of stock in said bank should be liable, pledged and bound, at all times, in proportion to the number of dollars issued upon each of the shares that each individual or company hold, possess, are interested in, or entitled to, in the said bank, for the payment or discharge of the debts or contracts of said bank, or *for the ultimate redemption of all notes and bills issued, or that may be hereafter issued, by and from the said bank.* The persons and property of each stockholder was bound by the condition of the grant, and this was the lawful price paid by each holder of stock, in the corporation, *for the estate granted upon condition; he paid* $100 *per share for his stock in cash, and received the right to issue* $300 *in paper;* or the corporation of $300,000 had the right to issue an estate nf $900,000 in paper, as an estate upon condition; and each stockholder assumed under the law, his proportionate part of all the alliabilities debts and contracts of said corporation; this liability was the further price paid by each stockholder, beyond the cash payment for his particular stock of the said grant.

His liability to the creditors of the bank does not exist by reason of any contract made with those creditors (no dealings, contract, credits, or intercourse, ever existed between the plaintiff and the defendant stockholder in this suit). but the duty enjoined by the law upon the stockholders that, upon failure of the conditions in the grant, they indemnify and pay the bearer of the bills. This is what makes the defendant liable. *The condition broken is the gist of the action.* So long as the condition

in the grant was maintained unbroken, so long the defendant as a holder of the stock was relieved from all liability to pay any of the debts or contracts of the bank—not his contracts, but the corporate ~~contracts~~. The defendant in this suit is liable to the plaintiff, not upon any contract, verbal or written, but he is liable under the statute for and by reason of the user of the franchise and the condition broken. He is liable *not by reason of the common law, or by reason of any contract executed or not executed* between the parties to the suit, because no actual contract is set up or claimed, and the personal liability of the stockholder is repugnant to the law of corporation, and at common law, no liability is known beyond the corporate property; but the General Assembly of Georgia in its wisdom, having vested a large estate in the corporation and stockholders of said bank, upon the condition that said stockholders may operate, manage, use, and enjoy the increase, profits and advantage derived from said estate upon condition, so long as the condition in the grant is complied with and maintained by the corporation, and reads as follows:—"*That the said corporation shall not at any time, suspend or refuse payment in gold or silver of any of its notes, bills, or obligations; and if the said corporation shall at any time neglect or refuse to pay on demand, any bill, note or obligation issued by the corporation, according to contract, promise or understanding therein expressed, the charter hereby granted shall be forfeited.*" This being the condition in law under the statute, no liability against the stockholder did accrue and become due against said stockholder, so long as that condition remained unbroken, Yet, when that condition became broken (strictly construed under the statute), the law imposed upon said stockholder the duty to pay that part of the indebtedness of said corporation, issued upon each of the shares held by him.

This is plainly a statutory liability under the law, and

no promise or contract can be shown to exist between the plaintiff and the defendant. It is the duty enjoined, by virtue of the statute upon condition broken, that created the liability. The duty to make payment of the debts sued on is enjoined by the law. 3 Comyn's Digest, * 136, (R.) *Condition.*

A condition in law is that which the law implies without the express words of the party. And the liability is set out and liquidated. The exact sum due is shown in the complaint to be the sum issued on the shares held, (folio 6,) reduced by the payments made thereon. (folio 12.)

2d. The facts disclosed in this cause show that said bank had a circulation of $730,000 outstanding at the close of the war; that the defendant is the owner of 156 shares; that the capital of said bank consisted of 3,000 shares of the value of $100 per share; that the proportionate part or share of the whole amount of indebtedness on said 156 shares was $37,960; but by reason of the application of the assets of said bank by the assignees to the payment of its debts pro rata, the indebtedness or ultimate liability of said Thomas W. Coskery was reduced to $35,672. That this sum of $35,672 is the ultimate and final liability of said stockholder, after the assets of the bank have been exhausted and applied in payment of the debts of the corporation; then at that date, and by that process and operation of the law, the ultimate liability—that liability of said stockholder which is lastly and finally due—accrued, was ascertained by the calculation of the specific and certain sum of the remaining debts of said corporation, or the proportionate part thereof, issued on said 156 shares of the defendant. This calculation shows the sum of the ultimate liability of the defendant, lastly and finally due (liquidated); the exact sum, clearly and fully set out in the petition. (folio 6.) And the ultimate liability of the defendant is the ground of this action.

That the plaintiff's claims for payment from the defendant, Thomas W. Coskery, are founded on the statute of incorporation of said bank. The transcript of judgments filed as vouchers in this cause show that suit was commenced on — day of —, 1868, in the suit of Miles G. Dobbins *et al. vs.* John Craig and Charles A. Rowland, assignees of the Union Bank, and judgments (on the bank bills filed as vouchers) were entered in the cause on the 23d day of June, 1870, and the vouchers in said action were impounded in the hands of said assignees.

That suit was commenced on these bills before the 1st day of January, 1870, and judgment thereon entered after January 1st, 1870, and two several payments made on account of said judgments, by the assignees of said bank; and the fact appears, that these claims are not within the purview of the act of March 16, 1869, even admiting said act to be valid.

That act required all claims under contract, in existence before the 1st day of June, 1865, that suit must be instituted before January 1, 1870.

Plaintiff shows that he has literally complied with this part of the requirements of said act; he is not within the purview of said act as plead in the cause, but his right of action on the $3,864 (the balance due on said judgments) is governed by the Code of Georgia.

The facts above set forth are not disproved or disputed by the defendant's proof or pleas.

The bank bills, amounting to $8,545, were acquired subsequent to 1871, and protested July 12, 1872; and this fact of the acquirement and protest of said bills subsequent to January 1, 1870, is not disproved by defendant's proofs nor even disputed by the defendant's pleas, although alleged in the complaint. They are admitted facts, and the plaintiff submits the fact to be, that these notes, vouchers in the cause, and the debt thereby cre-

ated, does not come within the purview of the act of March 16, 1869. These bank notes did not constitute any contract between the plaintiff and the defendant; the plaintiff and defendant were strangers; no dealings whatever existed between them; *but the plaintiff does claim a right of contract, running from the corporation into his hands as the bearer of the bills*, and that contract is shown upon the bill and in the charter of the corporation; and that contract, strictly construed, exists during the existence and for the time which said charter was granted. But the plaintiff does not sue upon any contract, he sues upon the liability of the defendant under the statute, and he claims upon the ultimate liability of the defendant—that liability which is lastly and finally due. The contract of the corporation is, to pay the bearer on demand; the liability of the defendant exists at all times under the statute, and accrues upon condition broken by the corporation, each in his own time, strictly construed.

3. That the charter of said Union Bank extends and continues until the 1st day of January, 1880. (See laws of Georgia, 1853–4, page 174, Sec. 9.) And said act of charter has not been repealed, abrogated or changed by reason of the act of March 16, 1869; that said charter, for the purpose of this action, exists as fully and completely as the day that said corporation went into existence. That said act of March 16, 1869 does not purport to be a repeal of any part of said franchise of charter. That the General Assembly of Georgia did not intend to make said act of March 16, 1869, a repeal of any part of said charter; that the General Assembly of Georgia are controlled and directed under the constitution of 1868 (Art. 3, § VI, ¶ III, in these words): "No law or section of the Code shall be amended or repealed by mere reference to its title or to the number of the section in the Code, but the amending or repealing act shall distinctly

and fully describe the law to be amended or repealed, as well as the alteration to be made."

The fact is, no reference whatever was made to the charter of said bank by the act of March 16th, 1869. The act of March 16th, 1869, purports to control only those contracts in existence before the 1st day of June, 1865, whereas this suit is brought upon the statutory liability of the defendant, and is not claimed under any contract between the plaintiff and the defendant. It is the law that creates the liability of the defendant; but no contract is claimed to exist. Another fact appears in the record; the plaintiff never was a citizen of the State of Georgia, and his petition shows that his rights did not accrue or attach against the defendant during the period of time, the act of March 16th, 1869, included and applied as a statute of limitations. The franchise of charter gave to the corporation the unlimited right of the circulation of its bills during its existence.

The corporation existed until the date of its assignment *de jure*, and exists in fact until judicial determination or expiration of charter, neither of which events have occurred; and the plaintiff, as said non-resident citizen, did not come within the purview of the act as plead in the cause, to wit: the time in which it was plead to be effective.

The fact appears that by a strict construction of the statute of franchise no right of action had accrued to the plaintiff before the demand of his bills. A further fact appears that said defendant, under the said statute, was bound in person and property at all times to pay the debts of said bank. This fact being true, the defendant was liable to pay the debt of said bank on the 12th day of July, 1872. No liability was ever shown to exist against the said corporation on the bank bills vouchers in this action previous to that date. No protest of any

bank bill of said bank is shown to have been made previous to that date.

It is true the corporation had assigned all of its property on the 24th day of February, 1866, but under a strict construction of the charter, an assignment of the bank was no cause of action to the holder of the bills, the statute says, "according to contract, promise or agreement therein expressed shall be performed by the corporation or (on failure thereof) the liability shall accrue. No actual demand having been made previous to the protest of said bills in suit, no actual liability accrued previous to that date, and no liability of the stockholder had accrued previous to the liability of the corporation. Without a presentation and demand of the bills no condition in the charter was broken, because the default was unknown and no public default has been shown previous to the assignment. Both of the witnesses for the defendant (Mr. Miller, a director, and W. E. Jackson, a former president of the bank, and director,) deny any protest of the bills of the bank, or suit against the bank, before its assignment. (Folios 95 and 96.)

Conclusions of Law.

The plaintiff's right of action, is founded on the statute of charter of the Union Bank of Georgia, for the ultimate liability of said Thomas W. Coskery, to pay that part of the debts and contracts of said bank, issued on the shares held by said defendant.

The evidence of the indebtedness of the bank to the plaintiff, is founded upon the issues of the bank vouchers in this action, and is divided into three parts.

1st. The transcript of the two judgements entered in the Superior Court of Richmond county, Georgia, on the 23d day of June, 1870, founded on the bank bills,

the issues of said Union Bank, filed in the hands of the assignees of said bank in 1869, (see folios 8 and 9,) for *pro rata* dividend out of the assets, and impounded by the order of said court in the hands of said assignees (see Record folio, 80), and upon which said bank bills so filed in said cause, said court and jury directed judgemnt to be entered thereon, as averred by plaintiff (folios, 54 and 57), and as shown by folio 57, and the credits of the *pro rata* dividends paid by the said assignees are allowed, and deducted from said judgements.

2d. The $7,657, of the bank bills of said Union Bank, protested July 12, 1872, (folio, 11).

3d. The $788, of the bank bills not protested but filed as vouchers of the indebtedness of the bank.

to plaintiff

These vouchers filed in the cause show the indebtedness of the bank; and it is the act of charter, and the user of the franchise that shows the indebtedness of the stockholder, to plaintiff a

Under the common law, no right of action exists against the stockholder in this suit (Green *vs.* Exchange Bank); the liability of the stockholders is repugnant to the law of corporations, (Angel & Ames on Corporations,) and it is on the statute, and on this special statute alone, strictly construed, that the right of action is claimed against the defendant in this cause,

The facts set out in the petition are not denied. The charter of the bank, the organization of the corporation and the user of the franchise as charged in the petition; the issue and circulation of the bills are admitted, and the indebtedness of the bank established. (Folio, 89.) The questions of fact are disposed of, and these operations and transactions of the bank are not alledged to have been illegal or void for illegality; and it only remains for a true, full, and clear construction of the law to dispose of this cause.

The bill of exceptions (folios, 28 to 98), states the pleadings in full. The defendant in error plead the act of the General Assembly of Georgia, March 16, 1869, as a statute of limitations in bar of said suit (folios, 16 and 157), and the plaintiff in error filed his replication, denying that he came within the purview of said act, and plead that said act was unconstitutional and void, as a bar to plaintiff's suit, because said act if applied as plead, took away from plaintiff a right of action that existed after the default of the bank, and a right of action that existed at the date of the issue of the bills, and existed at the date of the bank's failure; and gave to the defendant a defense that did not exist at the date of the issue of the bills, nor did not exist at the date of the failure of the bank.

The plaintiff's action against the defendant as a stockholder of said bank is founded on the statute of incorporation of said Union Bank, as ultimately liable for the debts and contracts of said bank (secs. 7, 8, and 9) set out and shown in the statement of this case, and as charged in plaintiff's petition. (Folio 5.)

The act of charter was a trust, enacted by the General Assembly of Georgia, conveying a franchise to certain persons; but the franchise of itself conveyed no property, substance, or consideration, or thing of value. The State did not convey any property to the corporators, nor did the corporators pay anything of value to the State for the franchise; but it was by the user of the franchise, the organization of the corporation, the subscription of the stock, the payment of the shares as capital, and by the acts of the corporators and the issue of bank bills by the corporation into the hands of the public as money to the amount of $730,000 that gave substance to the corporation.

That by act of the defendant, by the user of the fran-

chise, the estate upon condition was created and put into legal existence as a thing of value. (Code Georgia, 1867, §2313.) The acceptance of a trust is necessary to constitute a person trustee. It may be done by acts as well as words. After acceptance, no disclaimer will remove the character of trustee.

The corporators, by the acts of their officers and agents, under the corporate authority, created and circulated their bank bills or estate, upon condition, to the amount of $730,000. That estate was created for the profit, benefit, and advantage of all of the stockholders, and the increase thereof accrued to and belonged *pro rata* to each and every of the stockholders, not by reason of any contract between the corporators and the holders of (the bank bills) the estate upon condition granted, but by reason of the statute. The estate created existed, not by reason of any mutual dealings, debts, credits, or contracts between the stockholders and bill-holders, but it existed by virtue of the entry into the corporate existence, and the user of the corporate franchise by the stockholders, and by force of the statute. If any contract existed at all, it existed between the corporation and the bearer of the bills. The corporation was the medium of the circulation of the bills. In the eye of the law the corporation was the principal that created the estate, and every bill issued carried the condition from the corporate authority to the bearer, "payable to the bearer on demand."

This right to issue said bank bills and create said estate did not exist at common law. It was a violation of the code of Georgia for any person to issue any bill or note to circulate as money without the legislative authority. Said bank notes did not exist by virtue of any contract between the stockholder and the bill-holder. No dealings, credits, or communication existed between them. No contract, in form or in substance, existed as

between these parties. But the statute prescribed the form of the bank bill, and prescribed the amount of the estate or circulation that could be legally created and circulated. It was the statute, and by virtue of the statute alone, that the bank bills—vouchers in this suit—have a legal existence; and it is under the statute, and not by virtue of any contract, that the bank bills were circulated and the estate upon condition was created; and it is under the statute, and by virtue of the statute alone, that the defendant in this action, upon condition broken, is liable for the payment of that part of the debts and contracts of said bank issued upon the proportionate part of the shares of stock of said bank held by him.

The condition broken is the gist of the action. A condition in law is that which the law implies without the express words of the party.

3 Comyn's Dig., * 136 (R), Condition.

1 Sharswood's Blackstone, Book II, p. 299, note 5.

1 Speer, S. Carolina, 516, State *vs.* Bk. of S. C.

2 Coke upon Lyttleton, 232 *b*, Sec. 378.

The indebtedness of the bank is shown to be $730,000 (folio 6); that the defendant is the owner of 156 shares (folio 6), and that the proportionate part of said sum, issued on said 156 shares is $37,960, but by reason of the application of the assets of said bank by the assignees, to the payment of its debt *pro rata*, the indebtedness or ultimate liability of said Thomas W. Coskery, was reduced to $35,672. That after all of the assets of said bank was exhausted and applied to the payment of its debts, there yet remains the sum of $35,672 unpaid, that was issued upon the faith of said 156 shares; and that said sum is the final and ultimate liability of said defendant, lastly due, the assets of the corporation having been exhausted, the ultimate liability accrued under the statute.

Code, Ga., 1867, §§ 1497, 1491–2–3.

The part of the charter of the Union Bank, of Augusta, Ga., principally relied on by the plaintiff, to establish and maintain the liability of the defendant in this action, is found in Secs. 7, 8 and 9 of the charter, set out in the statement of this case, and it is not contended by the defendant that this franchise of charter was illegal or void, or that it has been annulled, abrogated or judicially forfeited; and said corporation, by its own terms exists until 1880. Corporations have continuous succession during the time limited by their charter, notwithstanding the death of their members. (Code, 1867, § 1677.

When the stockholders accepted the charter, and by the user of the franchise created the estate upon condition, they were bound by the terms thereof under the statute. The statute made a condition: that condition was, that if the corporation failed to pay its obligations on demand, according to contract, promise or understanding therein expressed, the said charter should be forfeited; and that the persons and property of the stockholders should at all times be pledged and bound for the payment of the debts and obligations of said bank, and for the ultimate redemption of all of the bills or notes issued thereby. This is not the promise or contract of the stockholder to the billholder; it is the statutory requirement of the franchise; it is the terms of the issue of the bill; it is the grant of the sovereign will, upon condition.

In the eye of the law, the corporation is the active operating principal—the maker and creator of the estate upon condition. The stockholder, it is true, was the pledgor; he had given his authority and direction to his agents, to create the estate upon condition; he had pledged his person and property in trust (*quasi contractus*), that upon condition broken by said corporation, he would assume and pay that proportionate part of the debts and contracts of said bank, issued according to contract,

promise or understanding therein expressed, and for the ultimate redemption of all notes and bills issued from said bank, upon each of the shares of stock held by him.

Under the common law and the law of corporations the stockholder is exempt from liability for the debts of the corporation; but under this special statute he is liable (*at all times*) to pay the debts and contracts of said bank, in proportion to the number of dollars issued upon each of the shares held by said stockholder.

This liability clearly exists under the law and not under any contract. The stockholder as the passive security, pledgor or guarantor of the payment of the debts and contracts of the bank upon condition broken was not bound to pay nor liable for any debt or contract of said bank until the condition was broken. It is true the statute says he shall be liable at all times; but the law will construe this to mean that he is liable only upon condition broken. If no default in the condition occurs no liability accrues. So is the liability of a surety by mortgage or indemnity for the debt of another upon condition; no liability accrues against the surety or his estate mortgaged until a default of the principal debtor occurs. It is the statute and the user of the franchise by the defendant that constitutes the act and makes the liability valid. It is the condition broken that creates the debt. 3 Comyn's Digest Debt (A.1.) *381; also *89, A. 3, Condition. 1 Comyn's Digest Act upon Statute (A. 1,) * 434. Action lies by the party grieved.

The defendant's liability under the statute is $243.33 on each share of his said 156 shares, reduced by the dividends of six and nine per cent. paid by the assignees of the bank. When the law raises the promise it is not within the statute of frauds and not in writing; the law raises the promise to pay the debt of another, (9 Mass., 513; Goodwyn *vs.* Gilbert,) and such a condi-

tion as is intended by the law to be annexed to anything is as strong as if the condition were put in writing.

2 Coke upon Lyttleton, 232 *b*, sec. 378.

That a condition in law by force of a statute that giveth a recovery is more strong than a condition in law without a recovery.

2 Coke upon Lyttleton, 233 *b*.

10 Coke's Eng. Rept., 42 *a*.

2 Sharswood's Blackstone Bk., 111, 160 *g*, top 159–60½.

"Another diversity is between conditions in deed, whereof sufficient hath been said before, and conditions in law—as if a man make a lease for life there is a condition in annexed unto it that if the lessee doth make a greater estate, &c., that then the lessor may enter. Of this and the like condition in law which do give an entry to the lessor, and the lessor himself and his heirs, shall not only take benefit of it but also his assignee and the lord by escheat, every one, for the condition in law broken in their own time."

2 Coke upon Lyttleton, 214 *b*.

So the plaintiff in error claims his right of action upon his vouchers filed in this cause upon condition broken at three different and distinct dates.

1. Upon the bank bills filed with the assignee for *pro rata* dividend he claims the right of action from June 23, 1870, the date of the judgment thereon entered by the court of Richmond county, Georgia, in his favor (folios 54 and 74;) also upon $7,657 of said bank bills protested July 10, 1872, he claims the right of action from the date of demand and protest (condition broken,) and upon the $788 of bills, vouchers in said suit; he claims the right of action only from date of suit; each cause of action for the condition broken; each in their own time and upon the separate demands; "for by the

common law no grantor or assignee of the reversion could take advantage of a re-entry by force of any conditions; * * but now by the said statute * * he may re-enter," &c. 2 Coke upon Lyttleton, 215 *a* and 215 *b*. In other words, the plaintiff claims his right of action upon the statute of incorporation, and that said statute shall be construed strictly. The common law gives no right of action in this suit, and where the common law and the statute differ, the statute law must rule. The statute strictly construed is the law. (9 Bacon Abridg. Stat. D. 224.)

The bank bills of the plaintiff impounded in the hands of the assignees, died in the hands of the defendant's agents by the said order of the Superior Court of Richmond County; but the life of the debt against the corporation revived by the entry of judgment thereon, June 23, 1870. Those bank bills being a debt of the bank, presented and deposited for payment in court, in the hands of the agents of the defendant, said debt has either revived in the judgment cited, or the court and assignees have been guilty of trover and conversion by taking forcible possession of plaintiff's property, and the plaintiff has labored under disability to enforce his claim or rights thereon since June, 1869, by reason of the unlawful acts of defendant's agents. But plaintiff submits that said judgment is a valid judgment or evidence of the debt of the corporation on the day that it was entered of record, June 23, 1870; and if the bank notes, as such, died in the hands of the assignees, then the debt revived as against the corporation and stockholders of that date; and said debt therefore, does not come within the period limited or barred by the act of March 16, 1869. The debts of the bank are the liabilities of the stockholders. These judgments have not been denied nor disputed in defendant's pleas, they stand admitted in the cause. The bank bill being a creature of

statute, and the debt of the defendant accruing under the statute, the statute law must rule over the common law. If the defendant was liable for the debts of the bank when the bank bills were impounded, he is also liable at the date of suit on the unpaid balance due thereon. Even admitting the act of March 16, 1869, to be a valid act, the debt of the plaintiff as averred, does not come within its terms. The evidences of the indebtedness of the corporation were acknowledged to be due and valid by the agents of the corporation after January 1st, 1870, and payments made on the debt after that date; and the statute says that said defendant stockholders shall be bound and liable therefor at all times.

The bank notes payable to the bearer on demand, vouchers in this action, were protested July 10, 1872. These bills contained on their face the contract of the corporation, by authority of the statute, running into the hands of the bearer, payable to the bearer upon the demand of that bearer. These paper tokens of value were made by the Union Bank of Augusta (under the authority of the General Assembly of Georgia), as a principal or payor of said bills, sanctioned by the public law and made a part of the public policy of the state. Paper issues were, and are to-day an absolute necessity to the public welfare, and these bills, vouchers in this suit, were made, issued, and circulated in furtherance of public policy, and in relief of public necessity, and at a gold value.

That said bank's charter is a statutory enactment by the State of Georgia, granting a franchise or estate upon condition to certain persons known as stockholders. These stockholders, by the user of the franchise, form the corporation as a principal; said principal being invested and constituted with a large capital, and possessed of a large estate upon condition, and in aid of the public policy of the State, and for the security of the public, the

stockholders of said bank were made guarantors or trustees and pledgors of their person and property, as security to the public for the redemption of the estate granted, and payment of the debts of the corporation that might be circulated into the hands of the public.

The defendant in this action is a stockholder in said bank, as shown, and is liable under the charter to the creditors of the bank for the payment of its debts; and, as a guarantor of the debts of the corporation, the statute of charter ought to be construed strongly against the debtor; and where doubt exists, that doubt should be construed in favor of the public, the holders of the issues and promises of the corporation.

2 Parsons on Contracts, 683–4.

The grant must be strictly followed. Having expressed some, it must have expressed all the conditions by which they intend to be bound under that instrument.

22 Wallace, 112; Maryland *vs.* Railroad Co.

1 Parsons on Notes and Bills, 274, chap. 8, sec. 2.

Bank bills never dishonored by lapse of time.

The charter must be construed as the contract of the defendant, and the 7, 8, and 9 sections are a part of it. If he is liable, it is his voluntary undertaking.

19 Georgia, 327, pars. 2 to 6; Dozier *vs.* Thornton.

The bank bills, vouchers in this suit, were issued and circulated as money, and intended to be used and circulated as money, during the existence of said bank's charter, unless demand of payment was made at an earlier date. Upon demand is the understanding and word expressed, even as to the corporation, and the liability of the stockholder to the bill-holder was conditional and collateral thereafter; bound at all times and ultimately liable, (*upon condition broken,*) which comports with the nature of a trust upon condition. When the principal

debtor is exhausted, the trust estate becomes liable and subject to the debt. This is clearly the law of the case.

20 Wallace, 520; Pollard *vs.* Bailey.

Pleas of the Defendant.

1st. The defendant has plead that on or before the 31st day of May, 1865, said corporation had become notoriously insolvent, stopped payment, and ceased to do business as a bank, and has not since resumed business, and therefore said action accrued before the 1st day of June, 1865, and has not accrued since that date, &c.

For the sake of argument of this cause, we admit the propositions of defendants plea; does anything in said plea contained give a right of action to the bill-holder against the stockholder? *Certainly not.* The statute says: "The corporation shall pay on demand, and upon failure to pay according to contract, promise, or understanding therein expressed, said charter shall be forfeited. No actual breach of condition has been alleged; no protest of bills; no suit to compel payment of any debt, bill, or claim, or any other actual breach of payment on demand by the corporation is shown by the plea. Two witnesses for the defendant, both directors of the bank, deny any protest of the bills, or suit against the bank, before its assignment, February 24, 1866. (folios 95 and 97.)

Insolvency of the corporation is not given as a cause of action under the statute. It is the failure to pay according to contract or understanding therein expressed, that incurs the liability. Insolvency is not included in the causes of action, stated in the statute, it is the actual default that gives the remedy. Under the common law the right of action by the bill-holder against the corporation might have been enforced, upon due proof of the facts alleged in the plea; and if the right of action, of

the bill-holder against the stockholder, had existed at common law, as against a co-partnership without incorporation, then said right of action would have existed upon proof of insolvency, and the plea presumably true. But, I submit, said plea does not reach the first point, under the statute, that constitutes a cause of action under the charter. The bank bill reads, "will pay the bearer on demand," and the defendant taking his own plea and evidence in the cause, has failed to show a demand; or any demand upon the bank, before June 1, 1865.

The defendant's plea and proofs fail to show the condition broken under the statute, before June 1, 1865, and upon condition broken the franchise was to be forfeited, how forfeited, is set out in the code of 1867. (§ 1491, —— 2.)

The statute says: "said corporation shall pay according to contract, promise, or understanding therein expressed," and the bank bills on their face contain the contract therein expressed; "will pay the bearer on demand," that is *the contract expressed*, and common understanding is, that said bank bills were never due, until presented and demand of payment made. That was the contract; and the common understanding between the corporation and the bearer of the bills, vouchers in this action; and this plaintiff in this action, received his bank bills, vouchers in this suit, upon the faith of said contract and understanding expressed on the face of said bills made by the law.

The defendant fails to show that the plaintiff was the bearer, of any of the bills, vouchers in this action, before June 1, 1865; and fails to show any such demand made by this plaintiff (or any other person), before June 1, 1865, upon the subject matter in this action; and his plea must fail upon that ground alone. He has failed to show a cause of action against the defendant before June 1, 1865, under a strict construction of the statute, *i. e.*, "*according*

to contract promise or understanding, therein expressed." The defendant fails to show the plaintiff to be the bearer of the bills before June 1, 1865. The defendant fails to make his plea good.

But the defendant answers that, by rule of common law, a state of facts existed, that gave the plaintiff a right of action, before June 1, 1865. To which plea the plaintiff replies: "That his bills filed before the assignees in proof of debt, in 1869, were received as a debt against the bank by the entry of the judgement, July 23, 1870 (folio 57), and his bills filed as vouchers in the suit, were acquired subsequent to the year 1870, as averred in plaintiff's petition (folio 11), and the defendant's witness has confirmed this fact (folios 93 and 94), and plaintiff submits the law to be, that no right of action did accrue to the plaintiff, until he was the bearer of the bills. That the defendant has failed to show any default, or act of bankruptcy of said bank, committed before making said assignment, February 24, 1866; and that the assignment of said bank or other public default, was necessary to give even the common law rule jurisdiction. That the bank still remained and occupied its banking house until assignment, and rented to John Craig (folio 68), and the law presumes it existed to that date.

That this action is founded on the statute strictly construed, and is not founded on the common law; and, accepting defendant's plea as true as plead, said plea under the statute shows no condition of the franchise broken, or cause of action against defendant accrued, before June 1, 1865; and therefore said plea utterly fails to show that any part of the subject-matter in this suit was due and payable by said defendant, Thomas W. Coskery, before June 1, 1865.

The defendant's plea is disproved by the facts in the cause. We find that on the 4th day of February, 1866,

the stockholders instructed the board of directors to make an assignment of all of the property of said bank for the benefit of all of the creditors (folio 59), and said assignment was made February 24, 1866, and it is a presumption of law that said bank existed for business until the date of said assignment. Although the fact of the insolvency of the corporation might be well known to the stockholders, yet no public act so declared it until the assignment—the public were not bound officially by the rumor of insolvency of the bank. Rumor was not proof of the facts if rumor existed.

The public act of Assignment the failure.

22 Wallace, 593–4, Ross *vs.* Jones.
8 Geo., 476, (6.) Secondly, Lane *vs.* Morris.

The last plea of the defendant is fully covered by the plaintiff's replication (folios 19 and 20) and the foregoing argument to his former plea. The last plea of the defendant alleges in substance that the bank bills of said bank, upon the insolvency of the incorporation, lost their quality of a medium of circulation, and degenerated into a right of action only, at some indefinite period of time before June 1, 1865, and that the right of action of the then bill-holder accrued against the then stockholder. If this action was brought under the common law against a mercantile firm for notes of hand issued, the common law rule would apply, but this action being brought on the statute for the ultimate liability of the defendant under the statute, then the statute strictly construed must rule the action.

In Bullard *vs.* Bell, 1 Mason, 243, Chief Justice Story says: "A note payable to bearer is often said to be assignable by delivery, but in correct language there is no assignment in the case. It passes by mere delivery

and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker (the corporation) to pay any person who shall become the bearer. It is therefore payable to any and every person who shall become bearer, and to every person who exclusively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer. The case is still stronger in relation to bank notes, for in the common transactions of life they pass, by delivery, as cash, &c., * * * *. Bank notes payable to bearer are always deemed good while they are in circulation, &c., * * *. The debt which the plaintiff claims from the defendant is a sum which the latter never owed to any other person. It is a chose-in-action originally vested under the statute in the present plaintiff, and which has never been assigned."

This authority cited is a leading and standard authority of law, and fully applies in this case. The promise in the bill to pay the bearer on demand, *is the act of the law; it is* the requirement of the statute, to make the bill valid; and that validity exists in the bill, so long as the corporation exists *de-facto*. The authority of the statute, moved the right of action from the original taker of the bill, to the bearer of the bill; and previous to the condition broken, by the corporation, the debt claimed by the plaintiff from the defendant is a sum which the latter never owed to any other person; and the debt could by no possible means have accrued to the plaintiff before he became bearer of the bills (see petition folio 11), and the debt could by no possible means, have acrued to the plaintiff, before default of the corporation, February 24, 1866, and, therefore, admitting the act of March 16, 1869, to be a valid and constitutional act of limitations, as to contracts and debts due before June 1, 1865, the present

action does not come within the purview of the act plead, and the plea of the defendant fails on that ground.

But, further: In Crease *vs.* Babcock, (10 Metcalf, 525,) in a suit by bill-holders against stockholders of the Chelsea Bank, Chief Justice Shaw, delivering the opinion, says: "The next question, argued as a separate and distinct question, *and one of considerable importance*, is, whether this remedy is confined to those who were holders of the bills at the time when the bank's charter expired by the repeal of the act of incorporation, * * * or whether it is necessary for the complainants, in order to maintain this suit, to prove affirmatively that they were the holders of the same bills in respect to which they now claim as creditors in this suit when the charter expired. Upon this question the court are of opinion that the remedy is not confined to those who were the holders at the time of such repeal, and that it is not necessary for the complainants to give proof of that fact; but when any person, after such repeal, took such bills in the ordinary course of business, or otherwise acquired a good title, such bills are remaining unpaid within the provision of the statute giving this remedy, and the holders of them have the right to come in and claim as creditors, &c. * * * Again, the legal character of a bank note is not necessarily changed at the moment that the act of incorporation is repealed. Suppose their credit is in some degree impaired, why should not a holder be permitted to transfer them according to their original character and purpose, at the best price he can obtain for them, exercising his own judgment to hold them himself or to confer on another the full rights of a *bona fide* holder? It seems to us that this construction of the law is the best calculated to carry into effect the purpose of the Legislature. * * * It was argued that although the bills were negotiable, yet the statute liability, when once fixed, is personal to the then holder, and cannot

pass to any other person by transfer of the bills. But we cannot feel the force of this argument. If the statute had provided that the persons then holding the bills should be entitled to claim, &c., there would have been more force in it; *but the same power that created this liability could as easily annex it to the bill and make it to pass with the bill to any one who should become the holder; and this we think is precisely what the statute has done.*"

So that when the plaintiff in this action received his bills in South Carolina in 1871, said bills at that date possessed the validity of a present issue. The debt of the defendant arose at the date of the protest of the bank bills in suit, and did not arise before June 1, 1865.

The statute authorizing the making of the bill—the issuing and circulating of the bill as money, upon condition—remains a valid and continuing right until condition broken. The chose-in-possession remains in the bill until the chose-in-action vests upon the demand of payment.

26 Georgia Reports, 27 (1) (2) (3); Robinson *vs.* Beale.

8 Georgia Reports, 476, (6) secondly, &c.; Lane *vs.* Morris.

56 Georgia Reports, 205–6–7; Cohen *vs.* Prater.

10 National Bankruptcy Reg'r, 289–93; Wilson & Shober *vs.* Bank of North Carolina.

This suit is for the ultimate liability of the defendant as a stockholder. He is liable under the act in two ways—first, primarily; second, ultimately, or that liability that accrues against the defendant after the assets of the corporation have been exhausted and applied.

8 Georgia, 477; Lane *vs.* Morris.

53 Georgia, 477; Dobbin *vs.* Sibley.

20 Wallace, 520; Pollard *vs.* Bailey.

In the case of Pollard, he was *bound for the proportionate part of all of the debts of said bank*, and that gave to him the right to have the assets of the corporation exhausted and applied to the payment of the corporate debts, before his liability accrued. In this case, the defendant is liable for all of the debts and contracts of said bank issued upon his shares. That sum has been fully set out and determined; the assets of the bank exhausted and applied, and the ultimate liability of the defendant liquidated, and said liquidated sum once paid, the defendant is forever discharged. The individual liability of a stockholder on a liquidated sum, is fully sustained by the courts of Georgia.

53 Georgia, 502; Branch *vs.* Baker.

10 Nat. Bankruptcy Reg'r, 356–7–8; Brass and Copper Co. *vs.* Lamp Chimney Co.

50 Georgia, 637; Andrews *vs.* Gwynett Manufacturing Co.

But the defendant pleads that said bank notes were issued before June 1, 1865, and by rule of common law said notes became due, and the liability of said defendant to pay the contracts and debts of said bank, and his ultimate liability to pay all of the notes and bills issued by said bank, *if ever* accrued when said bank became notoriously insolvent, stopped business, &c., before June 1, 1865, and that the same are barred by a failure to institute suit thereon by January 1, 1870, as required by act of the General Assembly of Georgia, passed March 16, 1869; entitled—"an act in relation to the statute of limitations, and for other purposes."

The plaintiff in error submits that the defendant in error is mistaken in the facts and in the law as applicable to this suit.

1st. Plaintiff's suit against the defendant is founded upon the statute, for the ultimate liability of the defendant, but is not brought under the common law, nor

for the primary liability of the defendant, and therefore the statute must be construed strictly, and no actual default of the corporation has been shown before the date of assignment, February 24, 1866.

2d. Plaintiff submits that under the statute, the charter extends to the year 1880 (Code of Georgia, 1867, § 1682), that said charter has not been repealed, annulled, or judicially determined, and that the bills, vouchers in this action, came to him by delivery in 1871 (folios 10 and 11), and that the bills so acquired, carried therewith, all of the rights of a present issue under the charter, and therefore, said bills do not come within the common law rule contended for in defendant's plea.

10 Nat. Bankruptcy Reg'r, 289–93.

Wilson & Shober *vs.* Bank of North Carolina.

That portion of plaintiff's claim founded on the transcripts of judgment, filed as vouchers in the cause, show that the bills of the bank were filed with the assignees, the appointees and agents of the bank, in 1869 (folio 9,), and payments made thereon by said authorized agents, both in 1869 and 1870 (folios 79 and 93), and the debt fully acknowledged in 1870, and if for any reason, the said judgments entered by the Superior Court of Richmond County, Georgia, shown by transcript (folios 57,), are held to be illegal or void for informality; then plaintiff submits that said corporation, by its agents, has possession of his vouchers and made acknowledgement of his debt in 1870; and that his debt is valid, and that he labored under disability by act of defendant's agent, from bringing suit before January 1, 1870; and plaintiff's claim in this action does not come within the purview of the Act of March 16, 1869.

The suspension of the corporation not a legal failure.

The assignment or actual default necessary to give public notice of failure.

1 Speer S. Carolina, *458; State *vs.* Bk. of S. Carolina.

8 Georgia, 476, (6), secondly; Lane *vs.* Morris.

2 McMullen, 440, *449–51; State *vs.* Bk. of Charleston.

22 Wallace, 593; Ross *vs.* Jones.

Statute requires the condition be broken for cause of action; according to contract, promise, or understanding therein expressed are the words of the statute. "Will pay the bearer on demand" are the words expressed on the bills. It was not any contract between the plaintiff and defendant that was to be broken, *but it was the contract of the corporation to the bearer of the bills*, and upon that fact being legally shown the liability of the defendant attached under the statute, but not under the common law. Without the statute no liability existed.

9 Bacon Abridg., Tit. Stat. (D), 223.

If no condition in the statute strictly construed is shown to be broken no right of action exists against the stockholder. Again, the statute says, "the person and property of said defendant stockholder shall at all times be pledged and bound in the same manner as in simple actions of debt or common commercial cases." How are simple actions of debt due? Under the common law an action of debt is always due from its inception; so a bank note is always due, except as modified by the statute. This statute of incorporation says, "*according to contract or understanding therein expressed;*" the tenor of the bank note says, "will pay the bearer on demand," (folio 5.) A commercial debt bears interest from the date of its inception until payment, but a bank note is the representative of cash, (money in hand,) and never bears interest until demand of payment from the bank.

Morse on Banks & Banking, 398 to 400.
2 Parsons on Notes & Bills, 2d Ed., 88 Chap., 4 Note *e*.

Therefore the breach of the contract by the corporation legally shown is the gist of the action, and establishes the liability of the defendant stockholder, due at all times by default, but never due under this act until default.

That under the statute of incorporation, granting the right to issue said bank bills, and prescribing their form and tenor, as shown in Schedule C, no debt or liability had accrued against Thomas W. Coskery to pay to this plaintiff any sum or sums of money until said plaintiff had made demand of said bank bills (now vouchers in this action) from said bank, nor until the judgments sued on (folio 57) had been obtained by exhausting the assets of said bank.

22 Wallace, 589; Ross *vs.* Jones.

That if this court holds that a demand upon the bank for the payment of the bills after the assignment of the corporation was unnecesssary to fix the liability of the defendant to pay said debt, then plaintiff submits that said liability did not accrue before said assignment was made and executed by said bank Feb. 24, 1866; that no actual failure or act of bankruptcy is shown before the assignment, and the presumption of law is that none existed before the assignment, and the proof of the defendant fails to show any condition broken before the assignment was made; and the public did not know, and could not be held bound to know, that which had not been officially or legally announced or determined. The statute gives the plaintiff his right of action, running with the bills as a vested right prescribed by the law, in the form required by the law, and the condition annexed to the bill in the words of the law.

Plaintiff's right of action under the statute has a validity of twenty years.

Irwin's Code of Georgia, 1867, § 2865.
8 Georgia, 478 (8); Lane *vs.* Morris.
11 Georgia, 497–8; Thornton *vs.* Lane.
12 Georgia, 113–8; Neal *vs.* Briggs.
10 Georgia, 177–8; Lane *vs.* Morris.
18 Georgia, 340–1 (3) (4); Banks *vs.* Darden.
30 Georgia, 581, sec. 5, 6, 7, 8 and 9; Hargrove *vs.* Chambers.
30 Georgia, 774–5; Dougherty *vs.* Berthune.

A vested right under the code of Georgia is protected by the new constitution of Georgia, adopted in 1868, Art. I, secs. 26 and 32; also Art. XI, secs. 4 and 5.

Subsisting trusts, cognizable only in a court of equity, are not within the ordinary statute of limitations. (Code 1867, § § 3140, 3141.)

The adjudicated cases of law in Georgia confirm the liability of the stockholder as an existing liability under the statute for twenty years. This was the *lex loci* in Georgia at the date of the issue of the bills sued on, and at the date of the alleged failure of the bank, and so remains to the present day.

1 Otto, 411–12–13; Scudder *vs.* Union Bank.
30 Georgia, 581; Hargrove *vs.* Chambers.
Code Georgia 1873, § 2916.

But, for the argument of this cause, let me assume that the theory of the defendant in his answer is correct as to his liability in this cause, being due before June 1, 1865. That the right of action of this plaintiff existed at the date of the issue of said bills, and vested at the date of the issue, and not at the date of the demand for payment (condition broken,) and then what aspect does this case present? We must first enquire the *lex loci* ex-

isting in Georgia at the date of the issue of the bills. Said bank bills, all having been issued in Georgia, the statute of franchise and the *lex loci* of the place govern and control this cause.

The statute says: "Said stockholder in his person and property shall be pledged and bound at all times for the number of dollars issued upon each of his shares by said bank for the payment and discharge of the debts or contracts of said bank; and said fact being true, and all the bills in said suit were dated in 1854, (folio 89,) and of a legal and valid issue at that date, then by the user of said franchise said stockholder pledged and bound his private estate as a trust fund (as a bailor he bailed his private estate to the extent of the bills issued on his stock,) to the bearer of the bills; and by force of the statute he was a trustee for the ultimate redemption of the bills issued and debt created by the corporation by the issue of the bills, vouchers in this action, and the trust run into the hands of the bearer of the bills for the security of the debt."

Hotchkiss' Code of Georgia 72, sec. 14.
" " " 352, (33.)
" " " 365, (90.)
11 Georgia, 502; Thornton *vs.* Lane.
19 Georgia, 288; Dougherty *vs.* Berthune.

The right of action for the recovery of said debt, the defendant pleads, existed on or before June 1, 1865, by reason of the insolvency of said bank. Assuming said plea to be true, what was the status and condition of plaintiff's right of action at that date, as shown by plaintiff's petition and evidence of defendant's witness? (Folios 94–5–6.) The bills in evidence of the debt sued on were issued by said bank into the hands of the public to petitioner unknown, the right of circulation and delivery by bearer not restricted or illegal, "payable to the

bearer on demand," not dishonored by demand of payment, but passing from hand to hand for value (folio 94), as shown by defendant. How could and how was plaintiff's rights affected by the alleged maturity of the bills? If the bills were due the bearers had waived their right of demand and the enforcement of their action. The corporation and the defendant, both had waived their right of legally declaring the corporation insolvent before June 1, 1865. It is shown by the defendant that the corporation redeemed $75,000 of the bills after that date. (Folios 94 and 95.

By a demand of payment, and protest noted, said bills would have lost their right of circulation by delivery; with refusal of payment, and protest noted, the bank bill died, and became changed from a right in possession, to a chose-in-action only, and under the statute it vested against the defendant stockholder, by reason of the default of the corporation. The protest of the bills, established the default of the corporation, and upon the default of the corporation established the liability of the defendant accrued.

The estate of said bailor became forfeited to the bearer of the bills. The subsisting trust carried the right of action to the day of condition broken; assignment of the bank, or protest of the bills.

The defendant pleads, that the same result occurred to petitioner, and to defendant stockholders, by the insolvency of the bank; that would have occurred by assignment made by the corporation, and protest of the bills noted, before June 1, 1865.

But petitioner's replication denies that statement. Under the common law, the results might have been the same; but the common law has no application in this cause. Under the statute the statute must rule, construed strictly. The defendant's plea is not broad enough to cover the allegations in the petition.

The allegations of the plea do not control the statute. But assuming the right of action accrued to petitioner, before June 1, 1865, (five years before he came in possession of the vouchers filed in this action), and vested as against said defendant at that date, what was the status and condition of plaintiff's right of action at that time? Under the statute of charter, the plaintiff's right of action existed as a specialty against said defendant for twenty years.

Irwin's Code of Georgia, 1861, page 535, § 2857.
1 Bouvier Institutes, 331, § 854.
8, 10, 11, 12, 18 and 30, Georgia Reports, heretofore quoted.

The statute law of Georgia, and the judicial decisions of the courts of Georgia, both go to sustain the plaintiff's right of action at that date, as a vested right of twenty years; and the *lex loci* governs the *lex fori*. That under the laws of Georgia, as enacted in the code of 1861 (page 535, § 2857, and page 280, § 1440, and page 279; § 1434–5), in full force during the year 1865, and the universal decisions of the courts, and the public policy of the General Assembly of the State, all combined to make the stockholders of the banks liable for all of the debts and issues of the banks; and that said liability under said statutes, so far as judicially determined by the highest courts of the State, universally held that, upon condition broken, the liability of the stockholder under the statute, had the binding force of an instrument under seal; to-wit, a validity of twenty years, and that the ultimate liability was secondary and not primary.

Code 1867, § 2865.
11 Georgia, 486; Hightower *vs.* Dozier.
13 Georgia, 287; Thornton *vs.* Lane.
30 Georgia, 599; §§ 6, 7, 8; Hargrave *vs.* Chambers.

30 Georgia, 774–6; Berthune *vs.* Dougherty.
3 Mason, 320; Wood *vs.* Dummer.

And the rule of law is, persons acquiring bank notes receive all the rights and equities of the grant conferred by the charter.

8 Wallace, 63–4; Furman *vs.* Nichols.

Plaintiff submits that if his right of action on the vouchers in this suit accrued and vested in May, 1865, then his right of action at that date had a validity of twenty years, under the laws and Code of Georgia then in existence, and if said bank bills outstanding at the date of the insolvency of the banks degenerated from a chose-in-possession to a mere right of action as plead by the defendant, then the plaintiff acquired no title to a right of action for the debt by the mere transfer of the bills. If the debt became fixed (upon the insolvency of the bank) in the then holder of the bill, no transfer of the debt could be made without assignment thereof. But plaintiff submits that said plea cannot be true. No demand of payment of the bills having been made upon the corporation in 1865, no protest of the bills or suit for payment of the debts of said corporation having been made before its assignment, no condition in the charter was broken; no bailor was bound; no trust estate was liable for the payment of the debts of the corporation, and the defendant was released from the payment of his liability, under the statute, without consideration or payment.

Plaintiff submits that the defendant's plea is repugnant to the statute, and said defendant's plea does violence to the intentions of the General Assembly of Georgia enacting said statute. It cannot be a reasonable construction of the intentions of the General Assembly of Georgia to say, "that said General Assembly would enact a law declaring the liability of said defendant as a

stockholder of said Union Bank under the statute upon a condition, and after said defendant had participated in and reaped the benefit of said grant, and then upon condition broken, and the liability of the defendant accruing under the statute, that said defendant should be freed and discharged by a common law construction of the act of incorporation; whereas by strict construction of the statute he is liable as said stockholder in this action."

The presumption of law is, that the General Assembly intended to do, in fact, *what they plainly purported to do in the act.* And the intention of the General Assembly is the law. They intended to make the stockholder liable, so as to secure payment of the debt to the bearer of the bills. The plea of the defendant ignores the authority of the Legislature, and the intentions of the Legislature. If said plea be true, then plaintiff submits that the common law rules the statute; whereas the decisions are, that where the statute prescribes a certain form or mode of action, in derogation of common law, that form or mode must be pursued strictly.

9 Bacon's Abridg., Stat. (1,) (G.), 236½.
1 Shars' Blackstone B'k, 1, 88, (7.)

The Sovereign Will is the Law.

1 Comstock, N. Y., 58; Corning *vs.* McCullough.
9 Georgia, 213; McLeod *vs.* Burroughs.
10 " 190; Winter *vs.* Jones.

It is under the statute, and under the statute alone, that plaintiff's right of action exists. In the language of Chief Justice Shaw (before quoted) " the same power of the General Assembly of Georgia that created the liability could as easily annex it to the bill, and make it pass with the bill, to any one who should become the bearer, and this we think is precisely what the statute

has done." The bank bill, by virtue of the statute, carried the right of action into the hands of every subsequent holder after issue, with all the rights of an original issue so long as the charter exists.

Morse on Banks and Banking, 399. By every transfer of the bill a new cause of action is created. The statute runs only from the time when the last holder came into possession.

Morse on Banks and Banking, 404.
1 Mason, 243; Bullard *vs.* Bell.
8 Wallace, 63–4; Furman *vs.* Nichols.

The Covenant Runs with the Estate Granted.

9 Mass., 486; Goodwyn *vs.* Gilbert.
2 Crokes (James) Rep'ts, 240; Ever *vs.* Strictland.
91 Otto, 64; Sauger *vs.* Upton.

From the foregoing arguments and authorities the plaintiff contends that his right of action against the defendant did not accrue before the assignment of the bank, nor did not accrue before the protest of the bank bills, and therefore the defendant's plea fails on that ground, because the present action does not come within the purview of the act of March, 1869, as plead.

But, if the court hold that the liability of the defendant in this action did accrue before June 1, 1865, then plaintiff pleads the unconstitutionality of said act of March 16, 1869, as a bar to his right of action.

The plaintiff's suit being founded on the statute, it is founded on the highest record of the State of Georgia known to the law.

1 Sharswood's Blackstone, Bk. 1, 185–6.
3 Comyn's Digest, *265, (A. 4.) Covenant.
6 Bacon's Abridg., 377, (D.) Lim. of Actions.

The sovereign will, it must be construed strictly.

9 Georgia, 213, McLeod *vs.* Burroughs.

And exists for the time for which it was enacted.

2 Coke on Lyttleton, *b* 236, sec. 384.
Code of Georgia, 1867, §§ 1677, 1682.

The action is properly brought. An action of assumpsit would not lie; there is no promise by the defendant on which to found an assumpsit. The action of debt lies by the act of the defendant, in the user of the franchise, under the statute. (3 Comyn's Digest, 265½, A. 4. Covenant.) Some words make a covenant in law, though there be not any express covenant. The right of action exists, not by right of any contract, but by duty of the defendant under the law.

The *lex loci*, as heretofore shown, gave to the plaintiff a right of action against the defendant that existed in Georgia for twenty years.

A bank of issue is a private corporation under the laws of Georgia.

Code of Georgia, 1867, §§ 1671–3.

"Private corporations heretofore created without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution by the will of the State."

Code of 1867, §§ 1671, 1673, 1682, 1685, 1688.
54 Georgia, 404, Central R. R. *vs.* State of Ga.

The charter of said bank was not repealed, and sections 1677, 1682, 1688, 2865 of the Code 1867, was not repealed by act of March 16, 1869; (see art. 3, sec. 6, par. 111 of the Constitution of Georgia, 1868, in full force at the date of the passage of said act,) as follows, to wit: "No law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section in the Code; but the amending or repeal-

ing act shall distinctly and fully describe the law to be amended or repealed, as well as the alteration to be made." * * * * *

This constitution of Georgia existed at the passage of the act of March 16, 1869, and remains of force to this date.

The act of March 16, 1869, as plead in this cause, is in restraint of right, penal in its nature, and therefore must be construed strictly.

13 Johnson, N. Y., 497, Sickels *vs.* Sharpe.
2 Paige, N. Y., 338, Setters *vs.* Tobias.

Said act was retroactive and retrospective entirely in its operations and character; it did not purport to govern, affect, or bar any actions or contracts to be made after the passage of the act; but affected and operated upon those rights and contracts only, which were in existence and had vested before June 1, 1865. This act is clearly in conflict with the Code of Georgia of 1867, in existence at the date of its passage. (See preliminary provisions, Code 1867, page 4, § 6): "Laws prescribed only for the future, they cannot impair the obligations of contracts, nor generally have a retrospective operation."

2 Otto, 636, Co. of Moultrie *vs.* Savings' Bank.
Sedgwick on Statutes, 160–5.

No repeal of the charter of the Union Bank is stated in said act, nor is any right of action arising under said statute authority, specially mentioned. No repeal of any section of the Code is mentioned: therefore said act of March 16, 1869, is a nullity as a bar to plaintiff's action.

The General Assembly—the sovereign authority—have not shown any intention, by said act, to repeal the said charter, or the said sections of the Code mentioned, and no repeal of these laws by implication could be made by said act, under the existing constitution. The preamble—the key to open the minds of the legislators to

the remedy sought to be enforced—is not disclosed in the act as plead in bar of plaintiff's suit, and it must fail on that ground. The said act is a nullity as a repeal of the *lex loci* of the transactions of said corporation, made before the existence of the act. No expression of the sovereign will is directed as a repeal of any specific law then in existence, and implication will not avail. Art. 3, § 6, ¶ 3, new constitution. Said act must be construed strictly.

2 Johnson Reports, 379, Jones *vs.* Eustis.
9 Bacon's abridg., 224, Tit. Statute.
6 Cranch, 135, Fletcher *vs.* Peck.
9 Cranch, 45–51, Terret *vs.* Taylor.
8 Wallace, 63–4, Furman *vs.* Nichols.

Had the vouchers, filed with the assignees for *pro rata* dividend of the assets of said bank, read on their face—"*The Union Bank will pay the bearer on demand, on Feb.* 24, 1866," (date of assignment), and had the bank bills protested read—"*The Union Bank will pay the bearer on demand*, on the 12th day of July, 1872," will the defendant contend that said bills are now barred? I think not: and, in the language of Chief Justice Shaw, "*this is precisely what the statute has done.*" The statute took the bills out of the common law rule, and all rights run with the bill into the hands of the bearer. This was evidently the intention of the General Assembly creating the charter, and it certainly was the contract of the corporation creating the bill. The contract run with the bill, from its issue to the date of demand.

The plaintiff is a non-resident of the State of Georgia, and cannot be held to account by the local laws of Georgia, now obsolete and void, that may have existed in Georgia prior to plaintiff's right of action against a citizen of said State; that plaintiff was not a creditor of said defendant, Coskery, as bearer of the debt sued on, before Jan. 1, 1870, and is not, therefore, within the jurisdic-

tion of the act plead in bar, neither as to citizenship nor as being a holder of the bills during the time prescribed in the act as a bar.

Plaintiff submits that his right of action does not come within the purview of said act, as plead. The covenant runs with the bill or estate granted. In the language of Chief Justice Lumpkin, in the case of Lane *vs.* Morris, 8 Ga., 476, "that a general suspension, and refusal to pay others than the plaintiff, was not such a failure as was contemplated by the act of incorporation; but that in order to avail himself of the benefit of the provision, the plaintiff must prove a demand on his own account and refusal to pay." In other words, in order to enforce a forfeiture under the statute, legal proof must be shown that the condition of the grant under the statute was broken. The condition broken was the gist of the action. The law raises the promise to pay the debt of another.

That if said right of action by the plaintiff did not exist from the date of the issue of the bills in proof of debt, then said right of action was inchoate, and had not attached within the State of Georgia until the date of assignment, nor until the date of the protest of the bills, July 10, 1872. (A non-resident bearer should only be bound by the laws in force at the date that he comes within the forum.) If said bank bills had read "payable to the bearer on demand on July 10, 1872," then in that case no time could have run upon the debt in suit, and under the act plead plaintiff's right of action would have been barred before the debt accrued; the right would have been barred before the remedy existed, and the principle laid down by the Supreme Court of Georgia in Black *vs.* Swanson, 49 Georgia, 425, would be the rule in this case. Judge Trippe says (page 427), "the note held by plaintiff in error, though made before, was not due until after June 1, 1865. No right of action accrued until after that date, and by the act of March 16, 1869,

it is controlled by the limitation laws set forth in the code. As by those laws his right of action would not be barred until December, 1871, and as he had pleaded the note in June, 1871, as a set-off to an action brought against him, he is entitled to recover thereon so far as he is affected by the statute of limitations."

Another fact may be mentioned: "The stay laws enacted by the State of Georgia existed of force in Georgia from 1861 to July 21, 1868," and if plaintiff's right of action accrued in 1865, as plead by the defendant, then plaintiff's right of action which accrued under the statute, and vested under the code for twenty years, was curtailed and shortened by the General Assembly of Georgia to the period of seventeen months and ten days, to wit, from July 21, 1868, to January 1, 1870, by said stay laws. But plaintiff submits that the construction of the act as plead in this cause cannot be true. The bills in proof of debt were legally issued, payable to the bearer in twenty-six years, or during the existence of the bank's charter, 1880, on demand of the bearer; and this is the only condition. Without demand no condition is broken under the statute, and the contract of the corporation runs to the bearer; the chose-in-possession remains in the bearer of the bill until the chose-in-action arises, and accrues to the bearer by default of the corporation. Default does not accrue before the condition is broken, because a different bearer was in existence at an antecedent period of time, and no condition was broken as to him. The charter says, "*according to contract or understanding therein expressed*;" the bill says, "*will pay the bearer on demand*," and the words of the charter must be construed to mean *what they plainly say*. But the bills not having been borne nor demanded before July 10, 1872, that date must rule the right of action in this suit on said bills.

Where the statute and the common law differ, the

statute construed strictly must rule the common law. No right of action accrued to this plaintiff in this suit, before June 1, 1865, and therefore no right of action existed before June 1, 1865, to be barred by act of March 16, 1869. And as the Supreme Court of Georgia decided in Black *vs.* Swanson, so plaintiff contends that his right of action in this cause, falls within the code, and the statute laws of Georgia in existence at the date of the issue of the bills, and in existence at the date of the assignment of the bank.

But should the court disagree with me as to the exact date, that the right of action accrued in this cause, and hold that my right of action existed, before my possession and ownership of said bills, then, I submit, that no right of action existed on the debt in proof until after the assignment of the bank, February 24, I866. No actual default occurred, and therefore no actual liability accrued, before the assignment.

Why should said stockholder, as a trustee and guarantor of the trust estate, be relieved or exempted from said liability. He bought his shares and estate upon condition; he paid therefor as capital in the corporation $15,600, and received back by the user of the franchise an estate of $46,800, of a gold value; and circulated the same into the hands of the public, for his own benefit and profit, under his own trust, and pledge for payment, as a privy to the corporation. He subscribed for the stock *cum onore* agreed (*quasi contractus*) to assume the burden of the redemption of the bills issued; and this was the price paid by said defendant for the grant of the estate issued on his said shares. A portion cash, the remainder bailed.

3 Mason, 312–4; Wood *vs.* Dummer.

50 Georgia, 637; Andrews *vs.* Gwynett Manf. Co.

And having voluntarily assumed the liability under the law for the profit, use, and increase of his private estate, he should be held bound under the statute, as a matter of right and justice for the debts thereby created and circulated on the public for his benefit.

If said defendant had executed a mortgage in trust, to save harmless the bearers of the bills of said Union Bank upon his ultimate liability under the ~~statute~~ mortgage; or had said defendant stockholder endorsed each bill, for the proportionate sum issued upon his said shares; could the beneficiaries in the mortgage, or could the bearers of the bills have had any right of action under the statute, against said defendant stockholder, before the actual default of the corporation was legally shown by direct proof? (22 Wallace, 593–4); then, if said plea would not apply as to a debt secured by a mortgage, or as to the endorsement of a bank note, to show default before June 1, 1865, why ought said plea to apply, so as to show the default in a personal trust under the statute, before the terms are actually broken? I trust no reason can be shown why said plea should apply, but the direct trust under the statute is the more sacred.

1 Sanders on Uses and Trusts, 310. (3).

In the case of a direct trust where an estate is conveyed to A, for the use of B, no time can bar the equitable rights of the latter.

30 Georgia, 774–5: Berthune *vs.* Dougherty.
23 Mississippi, 88: Payne *vs.* Bullard.

If the defendant's plea had fully and clearly stated that the act of March 16, 1869, repealed the act of incorporation of the Union Bank, making the stockholders liable for the debts of the bank not sued on before January 1, 1870, then the question would have been fairly put as to the liability of the defendant in this cause, or if said plea had stated that the defendant was discharged

from his liability by the repealing clause of the act of March 16, 1869, then that question could have been decided upon its merits; but defendant's plea seeks to avoid the main issue, and attempts to show, by a rule of common law, that the actual default of a private corporation was caused by its insolvency, without an actual default of refusal of payment by it, and that the plaintiff's claim in this cause comes within the common-law rule; whereas this suit of the plaintiff is founded on the act of incorporation, which takes this case out of the common-law rule, and is governed by the statute. The statute of incorporation, being strictly construed, makes the defendant clearly liable; and the act of March 16, 1869, plead in restraint of right, in bar of said action, strictly construed, does not repeal or annul said act of incorporation, nor embrace within its terms bank bills issued under act of charter, or the debt of the corporation so issued.

Let me repeat: Plaintiff's petition alleges the charter to be in force, and extends to the year 1880; that the vouchers, in evidence of debt, were issued and circulated and intended to be used and circulated as money during the existence of said bank's charter, as a valid consideration; that, in the due course of trade, and for value, subsequent to the year 1870, the plaintiff acquired said bank notes, and protested said bills July 10, 1872.

The answer of the defendant does not deny these facts, and for the purposes of this suit they stand admitted as though proven in the cause. But the defendant pleads that by act of the General Assembly of Georgia, passed March 16, 1869, the plaintiff's right of action, or at least the plaintiff's remedy on said right of action, was barred by the said act, as plead.

The plaintiff's replication to this part of defendant's plea denies the validity of said act to bar his said suit, and denies the application of said act as a bar in these

words: "That said act, if applied as plead in this cause, takes away a right of action and destroys a remedy that existed for the collection of the debt, founded on the bank bills and judgments sued on by the plaintiff, at the date of the issue of said notes, and existed at the date of the failure of the bank; and said act, if applied as plead in this cause, gives a defence to the defendant that did not exist at the date of the issue of said bank notes, nor did not exist at the date of the alleged failure of said bank, nor did not exist at the date of the obtaining of the judgments sued on in this action; and therefore said act is unconstitutional and void as a bar to plaintiff's suit. That if it was sought by the General Assembly of Georgia, by act of March 16, 1869, as plead in this cause, to annul the vested rights of demand for the debt due in this action, and to bar the remedy for the collection of said debt before said rights and remedies would have been barred by the laws of Georgia when said right of action accrued, then said act of March 16, 1869, should be held unconstitutional and void as a bar to this suit.

And if it was sought by the General Assembly of Georgia, by said acts, to annul the vested rights of said plaintiff in this action, before the right of demand had been made, upon the bank bills vouchers and evidences of debt in this cause; or before any time had run on the debts due to said plaintiff, wherein and whereby said plaintiff could proceed to enforce his said rights of action and remedies for collection of said debt (thus destroying plaintiffs' vested rights without consideration or payment) said act of the General Assembly of Georgia, is, and ought to be declared unconstitutional and void, as a bar to plaintiff's suit; to compel the payment of the ultimate liability (the last, the final, the concluding liability) of said defendant, under the statute.

The plaintiff sustains his replication, as follows:

In White *vs.* Hart, 13 Wallace, 647, in the opinion on page 652, the Court says: "It is well settled by the adjudication of this court, that a State can no more impair the obligations of a contract by adopting a constitution, than by passing a law. In the eye of the constitutional inhibition, they are substantially the same thing." Again, on page 653, nothing can be more material to the contract, than the means of its enforcement; *without the remedy, the contract may, indeed, in the sense of the law, be said not to exist*, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment, wholly upon the will of the individual. *The ideas of the validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution of the United States against invasion. The obligation of a contract, is the law which binds the parties to perform their agreement.* Again on page, 654, the court say: "When the contract here in question was entered into, ample remedies existed; all were taken away by the proviso in the new constitution." * * * * *

So are all of the plaintiff's rights and remedies in this action swept away, and nothing is left, if said act of limitations is sustained, as plead in this cause.

If the act of March 16, 1869, is sustained here, as a valid and constitutional act, and the plea of the defendant adjudged to be true as plead, every means for the enforcement of plaintiff's claim is denied, and this denial involves the annihilation of the statute of charter, before the chose-in-possession was dishonored, and thereby merged into a chose-in-action by the demand of payment on the bill. The validity of a vested right under the statute is annulled. The sanctity of legislation conveying rights by user of franchise of a charter is destroyed. The protection given to the plaintiff by the statutory rights in existence at the date of the adoption of the constitution of Georgia of 1868, are ignored and set aside;

and the right of action of the plaintiff, which constituted a specialty at the date of the bills issued, is barred without payment; and the defendant thereby discharged without day of his liability without consideration. But the plaintiff submits that said act is not a valid law to bar plaintiff's rights. The proviso which seeks to destroy plaintiff's right of action, and his remedy for the collection of the debt, is, in so far as all previous contracts and rights of action vested before its passage are concerned, itself a nullity.

Cooley on Constitutional Limitations, 289–90, says: "But a law which deprives a party of all legal remedy must necessarily be void. If the Legislature of a State were to undertake to make a law preventing the legal remedy upon a contract lawfully made, and binding on the parties to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract within the meaning of the Constitution, * (Call *vs.* Hagger, 8 Mass., 430,) * * * * and where a statute does not leave a party a substantial remedy, according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper, or embarrass the proceedings to enforce the remedy, so far as to destroy it entirely, and thus impair the contract, so far as it is within the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, and is void."

15 Wis., 28–31, Oatman *vs.* Bond.
56 Penn. 46, Penrose *vs.* Erie Canal Company.
18 Wallace, 548, Boyce *vs.* Tabb.
21 " 251, Ochiltree *vs.* R. R. Co.
2 " 21, Hawthorne *vs.* Califf.
Art. 1, Const. of the United States, sec. 10.

In 10 Georgia, 195–6, (2), (3), (4), (5), Winter *vs.* Jones,

Chief Justice Lumpkin says: "A constitutional act of the legislature, which is equivalent to a contract when performed, is a contract executed; and whatever rights are thereby created, a subsequent legislature cannot impair. And the authorities therein quoted." (See Opinion also, 198 to 201.)

In 53 Georgia, 512, Branch *vs.* Baker, Chief Justice says: "The plaintiffs in the several suits now before the court, are the bill-holders of the bank suing on that contract, and are endeavoring to enforce the same. The pleas of the defendants do not allege that contract to have been illegal, because it was in aid of the rebellion; and if the several matters of defence set forth in the defendants' pleas are authorized by sec. 17 of the 5th art., par. 2 of the Constitution of 1868, the same is unconstitutional and void as to contracts made prior to the date thereof, because it impairs the obligation of the contract sued on, by creating a defence to that contract which did not exist when that contract was made, and otherwise invades the rights of the plaintiffs as to their remedy to enforce that contract, which did not exist at the time the contract was made.

The pleas of the defendant, and the evidence offered thereunder as to the illegality of the contract sued on by the plaintiffs, constituted no legal or valid defence thereto as against the plaintiffs, who are the holders of the bills of the bank, issued in pursuance of its charter."

Also same opinion: "When the stockholders accepted the charter of the bank, it became a contract between them and the State, by which they were bound, in accordance with the terms thereof." Not as a contract between the stockholder and the bill-holder, (that is evidenced under the statute, the bill running from the corporation to the bearer); but a contract between the State and the stockholder. This, then, was the contract of the stock-

holder with the State for the benefit of the bill-holder, (*the trust upon condition*,) not the liability upon any contract made between the stockholder and the bill-holder, but it was the liability of the stockholder upon the condition of the grant broken, to pay the bearer of the bills, as enacted under the statute.

Mr. Justice Trippe, concurring, says:

"1st. Actions brought by the *bona fide* holders of the bank bills which were issued by the bank, payable to the bearer, and which passed into circulation as money, cannot be controlled by the provisions of the 2d par. of the 17th Sec., Art. 5, of the Constitution of 1868; nor can the illegality of such issue by the banks as contemplated in said provision be set up as a defence against the right of such holder to a recovery.

"2d. If said provisions of the Constitution were intended to apply to such cases, they are void under the 10th section of the 1st Article of the Federal Constitution, inasmuch as they not only annul subsisting contracts which were otherwise legal and valid, but imposes upon the holders of such bills impracticable conditions in cases of certain defences, and which practically deny all right of recovery."

So the plaintiff, in his replication, in denial of defendant's plea, that the act of March 16, 1869, was a bar to plaintiff's suit; plaintiff says: "that the act of the Legislature of Georgia plead in this cause is unconstitutional and void as a bar to plaintiff's suit; that said act, if applied as plead in this cause, takes away a right of action and destroys a remedy that existed for the collection of bank bills and judgments, sued on at the date of the issue of said bank notes, and existed at the date of the alledged failure of said bank. And said act, if applied as plead in this cause, gives to the defendant a defence that did not exist at the date of the issue of said bank

notes sued on, nor did not exist at the date of the alledged failure of the bank and obtaining of the judgments sued on in this action.

The plaintiff insists that his cause of action does not come within the purview of said act of March 16, 1869, that the date upon which his right of action matured did not arise until after June 1, 1865; that the Legislature of Georgia did not repeal, alter, amend or change the charter of the Union Bank, nor did not intend to repeal, alter, or change the charter of said bank, or the Code of Georgia, then in existence, by the enactment of said act; and if the said General Assembly did intend to change or repeal the charter of said bank, and did intend to apply the provisions of the 3, 4, 5, and 6 sections of said act to rule and regulate the charter of said bank, and rule and regulate the Code of Georgia, in existence at the date of its passage so as to apply the provisions of said act in bar of plaintiff's suit; then plaintiff submits said act of March 16, 1869, to be unconstitutional and void, under the 10th section of Article I, of the Federal Constitution.

And plaintiff submits said act to be repugnant to the Constitution of Georgia. Art. 1, Sec. 26 and Sec. 32; also Art. 3, Sec. 6, par. 3; also Art. 11, Secs. 4, 5, and the legislative authority of the General Assembly, of Georgia could not exceed the delegated authority of the Constitution, conferred on them by its adoption in 1868.

2 Story on the Constitution, § 1385, "A *fortiori*, a law which makes the contract wholly invalid, or extinguishes it, or releases it, is a law impairing it."

Under the Code of Georgia, 1867, § 2865, existing as the statute law of Georgia at the date of the passage of said act, the plaintiff's right of action existed for twenty years. If the right of action accrued under contract then the *lex loci* was twenty years, as heretofore shown.

In 16 Wallace, 317½; Whitehead *vs.* Walker, Justice SWAYNE, in delivering the opinion, says: "The laws which exist at the time and place of making a contract, and where it is to be performed enter into and form a part of it.

This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligations of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and are both parts of the obligation which is guaranteed by the constitution against impairment. * * * Any impairment of the contract—the degree of impairment is immaterial—it is within the prohibition of the constitution."

53 Georgia, 511; Dobbins *vs.* Sibley.

In Hawthorn *vs.* Calef, 2 Wallace, 21, Justice NELSON says: "Without stopping to discuss the question upon the statute we think that the case falls within the principle of Woodruff *vs.* Trapnel, 10 Howard, 190, and Curran *vs.* State of Arkansas, 15 Howard, 304, heretofore decided by this court. In the first of these cases the charter of the bank provided that the bills and notes should be received in payment of all debts due to the State."

The bank was chartered November 2, 1836.

On the 10th of January, 1845, this provision was repealed, and the question was, whether or not after this repeal the bills or notes of the bank outstanding at the time were receivable for debts due to the State. The court held, after a very full examination, that the clause in the charter constituted a contract with the holders of the bills and notes on the part of the State, and that *the repealing act was void, as impairing the obligation of the contract.*

In the second place the charter of the bank contained

a pledge or assurance that certain funds deposited therein should be devoted to the payment of its debts. It was held that this was a contract with the creditors, and that the acts of the legislature withdrawing these funds were void, as impairing the obligation of the contract.

So in the case at bar. On January 1, 1871, I find the bills, vouchers of debt in this action, passing from hand to hand for value, without the State of Georgia, not dishonored. I also find the banks' charter in existence not repealed, nor judicially determined; and on July 10, 1872, make demand upon the bank for payment of the bills, and default ensues. The condition then for the first time is broken as to these bills; the contract of the bank for the first time fails as to these bills; the right of action then accrues thereon, and the plaintiff proceeds to enforce his right of action against the defendant for the payment of the ultimate liability of the defendant incurred as a stockholder of said bank under the statute liable as a trustee for the debt. The bank fails to meet the demand, according to promise and understanding therein expressed. The right of action then accrued, and if it was the intention of the General Assembly of Georgia, by act of March 16, 1869, to bar the remedy of this plaintiff, as plead in this action, then plaintiff submits said act of March 16, 1869, to be unconstitutional and void, as a bar to this suit. That if the right of the transfer of the bills by delivery exists during the existence of the bank's charter, then the right of the remedy must follow it.

21 Wallace, 249; Ochiltree *vs.* R. R. Co.
19 Georgia, 348–9.
30 Georgia, 606 (9); Hargrove *vs.* Chambers.
9 Bacon's Abridg., 224.

Though one legislature may repeal an act which another legislature was competent to pass, as to usual legislation, yet, when a law is in the nature of a contract, and absolute

rights have vested under that contract, a repeal of the law cannot affect those rights.

6 Cranch, 135–6–7; Fletcher *vs.* Peck,
8 Wheaton, 75–6, also 91–3; Greene *vs.* Biddle.
6 Mass., 328; Doe *vs.* Warren.
Code Geo. 1867, § 1688.

The Supreme Court of Georgia have passed upon the constitutionality of the act of March 16, 1869, in the following cases:

In George *vs.* Gardener, 49; Georgia, 441, the Supreme Court says. (The act of 1869, is a general law, and has general operation throughout the State as to the class of contracts specified in it, the private rights of no particular individual are specially varied or affected by it, as contemplated by the 26 sec. of art. 1, of the constitution of 1868.

This construction of the act of 1869, does not invade or impair the obligation of the plaintiff's contract, and thereby renders the act unconstitutional, *it only affects his remedy on that contract*, that is to say; it prescribes the period of time within which he should enforce his remedy therein in the courts of the State. In the opinion of the General Assembly 9½ months was a reasonable time within which plaintiff's should have their remedy to enforce the class of debts or claims specified in the act, and we cannot say that the time was so short or unreasonable as to make the act unconstitutional."

Plaintiff submits said act of March 16, 1869, is in direct conflict with sec. 26, art. 1, of the constitution of Georgia. Said section reads: "Laws shall have a general operation, and no general law affecting private rights shall be varied in any particular case by special legislation, * * * *." The code in existence, and of the force of statute law in Georgia, at the date of the passage of said act, (page 4, Preliminary Provisions, § 6), says:

" Laws prescribe only for the future; they cannot impair the obligation of contracts nor generally have a retrospective operation. Laws looking only to the remedy or mode of trials, may apply to contracts, rights and offences entered into, accrued or committed prior to their passage; but in every case, a reasonable time subsequent to the passage of the statute should be allowed for the citizen to enforce his contract, or protect his right. And plaintiff here submits, that said act did not have a general operation, as to its application on the rights and claims to be affected by it; that said act was entirely retroactive in its application and effects upon the rights of individuals intended to be controlled by it. Said act was entirely retroactive and retrospective in its application. It did not include nor did not intend to affect or bar any rights, contracts or actions, to accrue or come due after its passage; but it was intended to affect and control only those rights, contracts, or actions that were in existence, or had accrued or became due in before June 1, 1865.

That said act was a class legislation, intended to bar contracts and rights of action in existence before June 1, 1865, but not those contracts and rights of action due after June 1, 1865, before the passage of the act, and did not intend to have a general application to all rights, contracts or actions that existed, accrued, or became due after June 1, 1865. That said act, if applied as plead in this cause, is in direct conflict with §§ 7, 8 and 9 of the charter of said bank, as heretofore set out and referred to; and said act is also in direct conflict with Art. III, § 6, ¶ 3, and Art. XI, §§ 4, 5, of the constitution of Georgia, of force at the date of its passage. Did said act repeal, modify, or amend the charter of said bank, or did said act repeal, modify, or amend any section or part of the Code, in existence as statute law of the State at the date of its passage? If it is done so by its repealing clause, or was intended to do so by any part of said act, by impli-

cation, then said act is clearly in conflict with Art. 3, § 6, ¶ 3, of the constitution referred to. Said act, as plead in this cause cannot stand in *pari materia* with the charter of said bank, nor with the provisions of the constitution, as heretofore shown, nor with the provisions of the Code of Georgia, as they existed (and herein quoted) at the date of the passage of said act. If the statute of charter, as plead in this cause, and the constitution and Code of Georgia stand as valid enactments, then the act of March 16, 1869, must fall; or if the act is sustained as plead in this cause, then the charter, the Code, and the constitution must have been regulated and controlled by it. (*A fortiori will not lie in this construction of the act.*) If the defendant's plea is true as plead, then the plaintiff's right of action; that would not be barred for twenty years (at the date of the alleged failure of the bank by the defendant), was shortened to 9 months and 15 days, after the passage of the act; in other words, plaintiff's right of action, that existed for twenty years under the charter, was diminished 19 years, 2 months, and 15 days under the act, the stay law of the State having intervened until July 21, 1868.

55 Georgia, 275 Bell *vs.* Hank.

With all deference to the opinion of the General Assembly of Georgia, this interference with plaintiff's right of action, as plead in this cause, could not be called a regulation of his remedy; because his right of action was barred under defendant's plea, before he received the bills sued on. No time whatever remained for the plaintiff to execute his remedy.

10 Georgia, 190, Winter *vs.* Jones.

13 Wallace, 647, White *vs.* Hart, a denial of the remedy is a denial of the right. In the language of Justice SWAYNE, "the ideas of validity and remedy are inseparable, and both are parts of the obligation guaranteed by the Constitution of the United States."

Wharton's Conflict of Laws, §§ 397*a*, 398, 399.
Sedgwick on Statutes, 104–5–6.

But, again, under the Code of Georgia in force and in existence at the date of the issue of the bills sued on as vouchers of the debt in this action, banking was restricted to incorporated banks, (Hotchkiss' Code, 356, S. 1, 54,) and the issue of bank bills was confined entirely to chartered corporations, and upon refusal to pay gold or silver on the bills or notes of the bank on demand a penalty of 2½ per cent. per month was thereby incurred by said corporation, payable to the bearer of the bills, and the bank's charter to be forfeited by judicial proceedings, (Hotchkiss' Code, 363, 85,) and receiver appointed to convert the property and assets of the corporation into cash, and distribute the fund to the creditors: If the property and assets of said corporation were insufficient to pay the debts of said bank, then the receiver was authorized under the code to bring suits against the private stockholders, or the representatives of such stockholders, for the purpose of recovering from them the proportionate part of such deficiency (or ultimate liability) according to the terms of the charter. (Hotchkiss' Code, page 365, 90.) Again, bank bills or notes payable to order or payable to bearer shall be taken and construed by virtue thereof due and payable to such person or persons, * * * * * * * * * and that person to whom such sum of money is or shall be by such note made payable shall and may maintain an action for the same, &c., * * * * * in like manner as in cases of inland bills of exchange. (Hotchkiss' Code, 440, 45.) This being the statute law of Georgia at the time the bills sued on bear date, said statute entered into and formed a part of the *lex loci* of the transaction, and the statute of charter and the code then existing defines the ultimate liability ot this defendant.

When the assets of the bank were exhausted, then the

ultimate liability of the stockholder accrued. The corporation then no longer existed for the purposes of its institution, and its final active operations ceased. No direct action against the stockholder accrues to pay the proportionate part of the indebtedness of the bank on his ultimate liability until the assets of the bank are exhausted (20 Wallace, 520; Pollard *vs.* Bailey), because his liability had not been liquidated until the corporate assets were converted and applied on the debts of the corporation, and the total deficiency of the bank ascertained. *That date* in this case was July 23, 1870.

In Addison *vs.* Christy, 49 Geo., 431, the Superior Court of Georgia say: "This was a suit upon an account dated January 31, 1866; suit filed March 19, 1870. The defendant plead the statute of limitations. The Judge of the Superior Court held that the statute of limitations did not run until July 21, 1868, and the jury rendered a verdict for the plaintiff. *The defendant appealed.*"

The Superior Court in their ruling say: "The words of the 8th Sec. (Act March 16, 1869,) as clearly apply to this case as they did to the case of Black *vs.* Swanson. That was an action that accrued after June 1, 1865; this is a contract made after June 1, 1865. Both cases are within the express words of the 8th section, and are governed by it. * * * * * * It was also objected that the 8th section could not have been intended to take away the benefit of the suspension acts—that is to say, that Sec. 9 of the Act March 16, 1869, as the repealing clause repealed the stay laws referred to. No one has denied or can deny that it did have, and was intended to have, that very effect in all cases of actions which accrued prior to June 1, 1865. It simply said that all such actions must be brought by January 1, 1870; but the iron heel of the Act of March 16, 1869, limited the right to January 1, 1870. * * * * * * After the fullest considera-

tion we feel constrained to hold that under the 8th section of the Act of March 16, 1869, the provisions of the code, as to the limitation laws therein, apply to contracts made since the 1st day of June, 1865. *Judgment reversed.* Thus maintaining the constitutionality and supremacy of the repealing clause section 9 of the Act March 16, 1869, as a repeal of existing laws without reference to their title or reference to the sections of the code repealed.

Black *vs.* Swanson, 49 Georgia, 424, above referred to, was an action on a note dated ——, 1864. The defendant pleaded as a set-off, a note made by the plaintiff, January 2, 1865; payable December 25, 1865, for $400.00 00; this plea was filed June 8. 1871.

The plaintiff introduced the note sued on, and closed. The defendant introduced the note plead as set-off, and closed. The court charged the jury—"that the note introduced and pleaded as a set-off was barred by the statute of limitations," to which charge the defendant excepted. The jury returned a verdict for the plaintiff. Defendant assigns as error, "the plea of the statute of limitations, March 16, 1869."

In their opinion the supreme court say: "It cannot be denied that there is great difficulty, if, indeed, there be not an impossibility, in construing the Act of March 16, 1869, so as to make all parts consistent with each other, &c., * * * * * * * * * *." The judge recites the act and discusses it section by section, showing the inconsistency and illegality of said act, and on page 426, says: "Again, a sort of omnibus provision, saying it matters not *whether the right of action had actually accrued* prior to June 1, 1865, or was then only inchoate and imperfect if the contract or liability was then in existence, the limitations should take effect. Thus far, it would seem that an action on a note executed in January, 1865, and due in the following December, suit must have commenced by the 1st of January 1870.

The 3d section and the latter clause are certainly in their words to that effect, * * * * * * no right of action accrued until the maturity of the note in December, 1865. The 8th section expressly says, that such cases shall be controlled and governed by the limitation laws of the code; those laws give the holder of the note six years from the time the right of action accrued. We solve the whole difficulty, as far as we can, by bringing this case within the 8th section. * * * * It is the last section of the act, except the repealing clause, and whatever may be the inconsistencies of the other sections, there can be no doubt as to the meaning of the terms used in this. The note held by the plaintiff in error, though made before, was not due until after June 1, 1865. No right of action accrued until after that date, and by act of March 16, 1869, it is controlled by the limitation laws set forth in the code."

In the foregoing cases, we have the rulings of the Supreme Court of Georgia upon the Acts of March 16, 1869, and its effect upon the contracts governed by the common law. *In the case of George* v. *Gardener*, 49 Geo., 441, this action was for the foreclosure of a mortgage made before June 1, 1865, but not due until after that date. This cause of action was held to be barred by said act under the common law.

In the case of Black *vs.* Swanson, a note made before June 1, 1865, and due after June, 1865, was held not to be barred by said act. And in Addison *vs.* Christy, it was held that the repealing clause of the Act of March 16, 1869, repealed the limitation laws of the code in existence at the date of the passage of the act; that the iron heel of said Act of March 16, 1869, limited the right of action to January 1, 1870. It true that these cases quoted are common law actions and subject to the common law rule, and are not parallel cases with the suit at bar, founded on the statute of charter; yet the sweep-

ing power and effect claimed for said act of limitation (plead in this cause), may be argued as a repeal of the act of incorporation of said Union Bank. If the right of action runs into the hands of the bearer of the bills under the statute of incorporation, then by the ruling in the case of Black *vs.* Swanson, plaintiff's right of action are saved in this suit, unless it is argued that the charter is repealed by the repealing clause of the act plead. No actual default or act of bankruptcy of the bank existed before February 24, 1866. No demand for payment of any bill of the bank, or refusal of payment, or protest of bills, or suit, or default of the corporation, or condition broken, has been shown before its assignment. If the allegation of insolvency, before June 1, 1865, is true, insolvency of the corporation without default, constituted no cause of action against the defendant under the statute. Under the common law, insolvency of principle is cause of action against the security; bnt under the common law, I have no right of action against the defendant stockholder. The liability of the stockholder is repugnant to the law of corporations (Carrol *vs.* Green), and at common law, the liability has no existence, and it is the statute alone that binds the defendant.

The bank bills, vouchers in this action, were outstanding, not dishonored, not due (Hotchkiss' Code, 440, Sec. 3, (45); 6 Bacon Abridg., 381–D., 3 Lim. of Action :) at the date of assignment. In the language of the Supreme Court of Georgia, in Black *vs.* Swanson, "The vouchers held by the plaintiff in error, though made before, were not due until after June 1, 1865. No right of action accrued until after that date; and by act of March 16, 1865, it was controlled by the limitation laws set forth in the Code." 53 Georgia 42. 3. Mc Clarau vs McCarty

Plaintiff submits that the present action does not come within the purview of the act plead. His right of action remains under the statute as regulated by the Code of

Georgia, and his right of action is not regulated by the act as plead.

In Kimbro *vs.* B'k of Fulton, 49 Georgia, 419, another adjudication was had. This was an action brought on the 31st day of May. 1871, in a justice's court, on the bank bills of the Bank of Fulton against the corporation for payment. Judgment was rendered in the justice's court in favor of the plaintiff. The case was carried by the defendant, on appeal to the docket of the Superior Court of the county. Defendant's fourth plea was the act of March 16, 1869, as a statute of limitations in bar, and said plea was sustained by said court of said county, and said ruling was assigned as error in exception to the demurrer on the third and forth pleas in the cause. *Judgment reversed. The right of action sustained.*

In their ruling upon said act the Supreme Court says: "2d. The authorities are numerous, and almost without conflict, that the statutes of limitations does not apply to bank bills, and it was so decided in the case of Dougherty *vs.* The Western Bank of Georgia; 13 Georgia, 288, and again recognized as the correct principle in 30 Georgia, 770. The reason given for such exception of bank bills from the common rule is, that they are by consent of mankind and course of business considered as money; that their date is no evidence of the time when they were issued, as they are being issued continually, returned to, and re-issued by the bank. Under such a state of facts it would be impossible to fix a starting point for the statute to begin to run. (See 13 Geo. Supra. and Authorities.) But if such bills have ceased to circulate as currency and have ceased to be taken in and re-issued by the bank and to be considered as money in the ordinary sense of that term the reason for that exception ceases. They no longer have that distinctive character from other contracts which excepts them

from the operations of the statute of limitations. (See remarks of Lumpkin, Judge, 30 Georgia, 774) * * *.

"3d. It does not appear from the record whether the bank bills sued on in this case had lost their distinctive character, and, if so, at what time. If it were prior to June 1, 1865, they then stood on the same footing as other contracts and come within the provision of the act of March 16, 1869, * * *.

4th. The rules of pleading in relation to the statute of limitations should be the same both as to plaintiff and defendant. That is, as it is necessary for the plaintiff, if he declares on a contract which on its face would be barred by the statute, to allege the facts, if any, which would take the case out of the statute, or be liable to a dismissal of his suit on demurrer; so should a bank, when sued on its bills, which are not, under the general rule, within the statute, show by its plea, if it rely on the statute, such facts as will bring the bills within its operation, or the plea can be demurred to.

The plaintiff indorses both of the opinions in 13th and in 30th Georgia referred to, but denies emphatically that the conclusions of law that are attributed to them in the ruling of Kimbro *vs.* The Bank of Fulton. But plaintiff submits that the opinions quoted are antagonistic and repugnant to the "dicta" of the ruling made in Kimbro *vs.* Bank of Fulton in the reasons given for the ruling. In the opinion quoted (13 Georgia, 298–9) the Supreme Court say: "They are issued (the bank bills) for the purpose of being used as money by the banks, and the State is a party to the consent that they should be so considered, because the power to issue, is a grant from the Legislature. Thus made money practically, it would destroy their monetary character to apply to them, in their character of securities for the payment of money, a limitation. If the bank is protected by a lim-

itation, then is that protection an injury, &c. * * * Nor has it (the bill) an end of life, because it is never overdue. If, as Judge Story says, it is never overdue, no matter when issued or how often reissued, but is always an immature representative of a legal tender, when shall the statute commence to run? Shall it be said, from the time of a demand and refusal to redeem? If so, then an insolvent bank—by which I mean a bank which is unable to redeem its bills—is upon a better footing than one whose credit is good—that is to say, the former is protected by the statute and the latter is not. Whatever of virtue there may be in that idea we shall not now determine, as such determination is not made necessary by this case. We determine that a bank note is not barred by the lapse of the statutory term commencing at its date, and that generally the statute of limitations has no application to bank notes. *Judgment reversed.*"

Plaintiff submits that the quotation of the authority (Dougherty *vs.* Berthune, 30 Georgia, 774–5) is an error or mistake of the learned judge delivering the opinion in Kimbro *vs.* Bank of Fulton. The authority referred to reads: "Does the statute of limitations of four or six years bar the plaintiff's right of recovery in this action? We think not, most clearly. But not for the reason assigned by counsel of the defendant in error. (He insists that this court has laid down the doctrine broadly that the statute does not apply to bank bills; and so it did. But that rule applied *perhaps* to the bank bills which continued to circulate as currency. But the bank bills in this case had ceased to circulate as currency. They had ceased to be taken in and reissued as currency.) But there is another reason, and to my mind a conclusive reason, why the statute does not apply. *This action is to enforce a trust. No remedy for this purpose exists at*

ommon law. But here it is given by the Legislature. Were the bill-holder to go into equity to enforce his trust, will it be pretended that the legal bar to plaintiff's claim could be interposed? Certainly not. Could the assignee of the bank, who has been put in possession of the effects of the bank to release those bills, shield himself under the statute from the performance of his trust? No one will seriously contend for this. And if he could not in equity, and the creditor has availed himself of a common-law form, as he had a right to do, under the authority conferred upon him by the Legislature, shall he thereby be deprived of a right which could not be taken away from him in equity? In other words, shall he be barred at law when he would not be in equity? We think not.

Judgment affirmed."

In this case the Western Bank of Georgia failed and made an assignment in 1841, and this cause was tried in 1859, and the validity of the debts founded on the bank bills issued and in circulation before 1841, was fully sustained and judgement affirmed; the short bar of limitations of four or six years, it was ruled did not apply, although the bills had ceased to be a circulating medium for more than fifteen years; and the suit was to enforce at law payment on a trust.

There is this distinction between the case at bar, and the case of Kimbro *vs.* Bank of Fulton.

In the case at bar suit is upon the statute to enforce a trust, the liability of the stockholder under the statute as bailor or trustee; whereas the suit in the case of Kimbro *vs.* Bank of Fulton, the action was directly upon the bills on the contract of the bank running to the bearer.

In the suit at the bar the statute authorized the issue of the bills payable to the bearer on demand, and upon that condition broken; the liability of the stockholder

on his bailment or trust accrued, and this suit is upon the statute to enforce payment from the bailor or trustee on that condition broken.

In Kimbro *vs.* Bank of Fulton, Justice Trippe says: "The reason given why such exception of bank bills from the common rule of limitation is; that they are considered money; that their date is no evidence of the time when issued, &c., * * * * * *. But if such bills have ceased to circulate as currency, and have ceased to be taken in and re-issued by the bank, and to be considered as money in the ordinary sense of that term, the reason for that exception ceases." And said Justice Trippe refers to Justice Lumpkin's opinion (hereto set out *supra*), to confirm said *common law ruling.* But plaintiff submits that no such ruling was made in said cause as claimed by said Mr. Justice Trippe. Mr. Justice Lumpkin says: "Does the statute of limitations of four or six years bar the plaintiff's right of recovery in this action?" We think not, most clearly. But not for the reason assigned by the defendant in error. He (the defendant) insists that this court has laid down the doctrine most broadly, that the statute does not apply to bank bills, and so it did. But that rule applied *perhaps* to bank bills which continued to circulate as currency. But the bank bills in this case, had ceased to circulate as currency; they had ceased to be taken in and re-issued as currency. "(The bank had assigned its assets more than fifteen years before that date)," and notwithstanding that fact, Mr. Justice Lumpkin maintained the validity of the bills, in his opinion, and the court gave judgement on the debt; even though the bills had ceased to be used as currency for fifteen years before that date. His ruling was not against the bills for the reason assigned by Mr. Justice Trippe, *but the reverse*; his ruling sustained the bills, and the right of action thereon, not withstanding the lapse of time, and the fact alleged that the bills had ceased to be

current money for fifteen years. And said Justice Lumpkin adds another conclusive reason why the limitations on said bills did not apply? "This action is to enforce a trust. No remedy for this purpose exists at common law. But here it is given by the legislature." A *fortiori*, in the suit at bar, it is given by the legislature.

This is the ground of the plaintiff's action in the case at bar; his right of action is founded on the sovereign will; the grant of the legislature, as vested under the statute, in conformity to the statute, and by authority of the statute. And plaintiff submits that his right of action exists under the statute, until divested by payment, or until the said right of action expires by the limitations in force in Georgia, at the date said right of action accrued under the statute.

In Kimbo *vs.* Bank of Fulton, the ruling was correct. The validity of the bank bills sued on was sustained. But the reason given for the ruling made are in direct conflict with the authorities quoted and referred to in the ruling; thus the ruling says:

"*But if such bank bills have ceased to circulate as currency and have ceased to be taken in and reissued by the bank, and to be considered as money in the ordinary sense of that term, the reason for that exception ceases. They no longer have that distinctive character from other contracts which excepts them from the operation of the statute of limitaions.*"

And plaintiff submits that all of Judge Lumpkin's decisions are in conflict with, and in opposition to the principles set out in the above quotation, which is attributed to him. But the reverse appears to be the universal ruling of the courts in Georgia, particularly 13 Georgia, 290, Dougherty *vs.* Western Bank, already referred to by Justice Trippe.

The said ruling of Justice Trippe implies that the statute rules, so long as the law is obeyed by the corporation

unbroken; but so soon as the bank fails to maintain its franchise unbroken, then the statute fails to protect the rights of bill-holders under the statute. The statute then becomes dormant, obsolete, or of no effect, and the common law applies to rule the rights of the parties affected by the condition broken. But, fortunately, the authorities are all adverse to any such ruling.

30 Georgia, 599, §§ 5, 6, Hargrove *vs.* Chambers.

The statute of charter and the Code of Georgia make no such provisions in case of the failure of said Union Bank, as that claimed in the ruling in Kimbro *vs.* Bank of Fulton, would imply. The statute creating the bank, the code in existence at the date of the failure of the bank, and the rulings of the courts of the State at the date of the passage of the act, all maintain the validity of the action in this cause; the opposite and reverse to the "dicta" in the ruling implied in Kimbro *vs.* Bank of Fulton, is the rule. No ruling by the Supreme Court in Georgia is to be found, in the books to this date, barring bank bills by act of 1869.

In the case of Terry *vs.* Tubman, 2 Otto, 156, the plaintiff in error endeavored to raise the constitutionality of the act of March 16, 1869, plead in the cause as an act of limitation. The assignment of error raised the constitutionality of said act as a bar to plaintiff's suit, and it was on that ground alone that said writ of error was prosecuted. But this court refused to consider the constitutionality of said act in that cause on the error assigned, for the following reasons: "He has, however, demurred to defendant's plea, which averred that the same facts existed and justified the commencement of a suit on the 1st day of June, 1865; in other words, that his right of action had accrued prior to June 1, 1865, and that the same is barred by the statute quoted. * * * * If his complaint is good, the plea is good. If the plea is

bad, the complaint is bad. A demurrer seeks the first fault in pleading, and it is with the plaintiff that the first error exists, if error there be."

And this Supreme Court did not consider or pass upon the constitutionality of said act in said cause. Therefore the plaintiff in this action prays the mature and deliberate consideration of that question by this court, as raised by the pleas and evidence in this cause, and upon the assignment of errors hereto submitted.

The act of March 16, 1869, being in restraint of right, penal in its nature, it ought to be construed strictly. Yet we find in the adjudicated cases in the Supreme Court of Georgia that the rulings and constructions of that court upon said act are not uniform and consistent. The cause of justice and equity being outraged by a strict construction of *said act*, that court has varied its meaning and changed its application in different causes. Thus, in George *vs.* Gardener, they have given a strict construction to the act, and decided that nine months and fifteen days was a reasonable time allowed by the statutes for the plaintiff to commence and enforce his rights of action before a bar attached by said statute as an act of limitations; that said act did not destroy plaintiff's rights; *it only defeated his remedy.*

In Black *vs.* Swanson, an opposite ruling was made, said court holding that a strict construction of the act plead defeated the equities in the cause; and a strict construction of the act was ignored and ruled upon adversely. In Addison *vs.* Christie, another varied ruling was had upon said act. In that case it was held that the act of March 16, 1869, repealed the stay laws of the State in existence at the date of the passage of said act, and said act thereby barred the plaintiff's right of action in that cause. In Wright *vs.* Zitroner, another case of varied ruling and interpretation of said act occurs.

In Atkinson *vs.* Keith, 50 Georgia, 580, note 3, it was

held that a right of action was not barred, although the right of action accrued during the time limited in the act of March 16, 1869.

In Aiken *vs.* Freeman, 49 Georgia, 51, a different ruling was had on the act of March 16, 1869, as a statute of limitation strictly construed; and in 53 Georgia, 42; McLaren *vs.* McCarty, the same question was re-argued and re-heard by the Supreme Court of Georgia, and the following language used by the court: "That while the first seven sections of the act of 1869 only apply as to rights of action accruing before June 1, 1865, yet the last section covers all cases where the right of action accrued since 1865. But we are clear that there is nothing in the last section broad enough to cover a *fi fa* and to set the statute running as to it." *The iron heel of the act* of March 16, 1869, failed to receive a strict construction in these cases.

Plaintiff submits that there is nothing in the act of March 16, 1869, broad enough to cover bank notes and to limit the statute running as to his bills in this suit, or his right of action in this suit.

In Kimbro *vs.* Bank of Fulton, we have a ruling directly upon bank notes. The bank notes sued on were issued before the war by a bank that collapsed at the close of the war. Suit was brought in 1871 against the corporation. The defence was the act of March 16, 1869, plead as a statute of limitations. The Supreme Court ruled that the bills were not barred, and maintained the action. The reason assigned for said ruling was that the defendant, by his plea, had failed to show a defence that came within the purview of the act plead, and the ruling in the cause ruled upon the common law, but did not rule upon the statute, and maintained the plaintiff's action as a common law right of action on the contract of the corporation running to the bearer of the bills.

Plaintiff submits the effect of the ruling was correct, but denies that the theory of the ruling was true. The "dicta" used by the court, conveys the idea that the act of March 16, 1869, was a repeal, or modification of the act of charter; or that upon the insolvency of the bank, the act of charter failed to protect the vested rights of the holders of the bills. In other words, a vested right under the charter of the bank, was annulled and repealed by the act of March 16, 1869, if the fact was disclosed to the court by the plea in the cause, that the insolvency of the bank or the discredit of the bills, existed within its purview. That a default of the corporation being shown to the court, then the statute of charter ceased to be operative, and the act of March 16, 1869, controlled the action at law.

To all of which contradictory and illegal rulings by said Supreme Court of Georgia, plaintiff submits that he is not bound.

18 Wallace, 546, Boyce *vs.* Tabb.
8 Wallace, 575, Butz *vs.* City of Muscatine.
4 Wheaton, 206–7–8, Sturgis *vs.* Crowninshield.

That plaintiff relies on his petition, pleas, and proofs in this cause, and facts thereto admitted, and his assignment of error to this court; relying upon the protection of his right of action under the statute of charter of said bank, as guaranteed by the Constitution of the United States, and as protected from invasion by the Constitution and Code of Georgia.

Plaintiff submits to this court, that he has alleged the facts in his petition and pleadings, which takes his right of action out of the purview of the statute of March 16, 1869, if said act is held to be constitutional and operative. But maintains said act to be unconstitutional and void as a bar to rights of action vested under this statute of charter of the Union Bank.

The fact thot the vouchers of debt sued on are bank notes, does vary the law.

1. Statute of Charter, Prince's Dig. laws, Ga., 116, 119.
2. Constitution of Ga., Art. 1, §§ 26, 32; Art. XI §§ 4, 5.
3. Code of Georgia, 1867, §§ 2749, 2865, and Pre. Pro., 4, § 6.
4. Constitution of U. S., Art. I, § 10.
5. 13 Georgia, 288, Dougherty *vs.* Western Bank.

30 do. 599, §§ 5, 6, Hargrove *vs.* Chambers.

30 Georgia, 774–5, Dougherty *vs.* Berthune.

6 Cranch, 135–6–7–8–9, Fletcher *vs.* Peck.

8 Wallace, 60–4, Furman *vs.* Nichols.

16 Mass., 271–4, Foster *vs.* Essex Bank.

52 Georgia, 525, Branch *vs.* Mechanics' Bank.

53 do. 511, Dobbin *vs.* Sibly.

That by force of the first seven sections of the act of March 16, 1869, plaintiff's right of action to enforce this suit, is barred, although his right of action did not accrue until after 1870; for in the 6th section of said act it is provided, "that the limitation shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to June 1, 1865, or was then inchoate and imperfect, if the contract or liability was then in existence."

That the 3d and 4th sections of said act bar actions where merely the contract was made, or for the rights according to individuals or corporations under the statutes or acts of incorporation, or in any way by operation of law, &c., * * * * * prior to June 1, 1865, although the action had not at that time accrued, and may not have accrued until the action was barred.

The 5th section of the same act, carrying out the same view in relation to guardians, trustees, and personal rep-

resentatives, provides that when the management or investment was made prior to June 1, 1865, although the cause of action may not have occurred before the 1st day of January, 1870, yet the action shall be barred at that date.

This is the only legitimate construction that can be placed upon these several sections, and what is lacking in the first five sections to carry out this view is fully made up and supplied in the 6th section, which specifically refers to and embraces the preceding five sections, and provides that in all cases recited in the previous sections the causes of action shall be barred unless brought by January 1, 1870, if the contract or liability was in existence on the 1st day of June, 1865. (53 Georgia, 42; McLaren *vs.* McCarty.) Plaintiff submits that the first seven sections of said act are repugnant to section 8, or the last part of said statute, and if the latter part of a statute is repugnant to the former part thereof the latter part shall stand, and so far as it is repugnant to the last section of the act the last section ought to repeal the former part of the act, because it was the last agreed to by the makers of the statute. Bacon Abridg., Title Statute (I), 2. If the proviso of a statute be directly contrary to the purview of the statute the proviso is good, but not the purview, because it speaks the latter intentions of the legislators.

The act of March 16, 1869, adopts the new code of Georgia, by the 8th section of said act, for all rights of action arising after June 1, 1865, which gives complainant a vested right of action for twenty years, and says expressly, "in which the right of action or the liability has accrued, or the contract has been made since the 1st day of June, 1865, shall be controlled and governed by the limitation laws as set forth in the revised code adopted by the new constitution of this State." This last section eight being the last part of said act made by its makers

(except the repealing clause), and being found repugnant to the first seven sections of said act, the last section should stand as a valid act, and the first seven sections should be considered as repealed thereby; because section 8 is in harmony with the act of charter, and in conformity to the *iex loci* in existence at the date of the issue of the bills, and is in *pari materia* with the new constitution adopted before the passage of said act. Section 8 agrees with preamble of said act, and with the rulings of the Supreme Court of Georgia, in the cases of Black *vs.* Swanson, 49 Georgia, 424, and McLaren *vs.* McCarty, 53 Georgia, 42; Angel on Limitations, § 22, note 3, pages 18, 19, and, as stated in the Supreme Court of Georgia, in Kimbro *vs.* Bank of Fulton, the authorities are numerous and almost without conflict, "that the statutes of limitations do not apply to bank bills," and although the "*dicta*" used, was of doubtful and evasive import in that opinion, yet the fact remains that the bank bills were sustained on a common law action. The contract of the bank running to the bearer of the bills.

But why multiply authorities? The books are full. The authorities legion. Did the bank legally exist? Is the petition true? Was the stockholder liable as charged, and admitted by the plea; if so; if he was liable for the debt in May, 1865, as plead by the defendant, under the Statute, Code, and Constitution as they existed at that date, how has the defendant in error been discharged from the debt?

The General Assembly of Georgia, "the sovereign will," granted the estate upon condition. The defendant in error entered into, and enjoyed the estate legally and honestly, and the plaintiff in error is the legal bearer of the estate and has sued for the debt created. The plea alleges that debt to have been vested due before June 1, 1865. And it that statement is true, then plaintiff in error had a vested right of action under the statute of

charter, the Code and Constitution of Georgia, that existed for twenty years; this is the *lex loci* of the transaction.

That statement being true the debt is a concluded fact. The charter being a valid law, we have both the law and the fact concluded. The debt then existed for twenty years. By what process is the right of action defeated? We are taught the fact that a right vested (as here admitted) can only be determined by payment within the time limited. These facts being shown and the law properly set out, the two elements being woven together correctly, must establish the plaintiff's right of action now in existence. Two positives cannot make a negative.

Under this statement the statute of limitation commenced to run on plaintiff's debt before June 1, 1865, except as stayed by the stay-law, until July, 1868; but (the plea being true) the right of action vested and the statute of limitations had commenced to run, then the statute must continue to run for the full time limited.

6 Bacon Ab'g. Lim. of Actions, (C.), 371.

6 Mass., 328; Doe *vs.* Warren.

But the plea alleges that the liability of the defendant having accrued before June 1, 1865, the right of plaintiff's right of action is barred by act of March 16, 1869. The plea shows that the act plead is retroactive and retrospective; that the act plead intervened to cut short the time allowed in the Code from twenty years to seventeen months, and gave to the defendant a defence that did not exist at the date alleged, that the right of action accrued. Plaintiff submits that, accepting said plea as true, then the plaintiff is barred before he comes within the *sitz*; before he comes within the jurisdiction of the court he is barred, (Wharton's Conflict of Laws, § 397 *a*, § 398, § 399,) then said act is repugnant to the Constitution and the Code of Georgia, in force at the date of its passage as interpreted by its own showing; "that

said act had intervened to cut short the limitations of a statute already attached under the Code, and destroyed a right of action that existed for the collection of a debt not otherwise barred by the laws in force at the date of the passage of the act." And therefore said act is repugnant to the Constitution of the United States, Art. 1, Sec. 10.

But again: The act in question is not consistent in all of its parts. The preamble of the act refers to matters of accounts. And this is the key that opens the minds of the makers, to the mischief intended to be remedied by the statute. But what do we find in the act? The first seven sections of the act are not in conformity to the preamble; but they take within their scope all of the rights of action known to the law. They assume to control and regulate the delegated powers of the constitution and code of the State as adopted before its passage, by creating a bar to all suits and all rights of action in existence before June 1, 1865, (choate or inchoate,) if not sued before January 1, 1870. But the last section of the act is repugnant to the first seven sections. A right of action accrued May 31, 1865, that would not be barred before the expiration of twenty years. Yet, under the first seven sections of said act, said right of action was barred in nine months and fifteen days after its passage. Yet the right of action of the same dignity and validity that was contracted three days subsequently (to wit, June 2, 1865) had a validity of twenty years. That said act plead did not limit all contracts and causes of action then in existence, but only those that were in existence before June 1, 1865, (a class legislation.) And the proviso of the act provided that all contracts and causes of action made and accrued since June 1, 1865, should be controlled by the limitation laws of the code, (in other words, limiting one person's right of action to nine months and fifteen days, while another person enjoyed and possessed the same right of action for over

nineteen years whose contract was made three days subsequently,) under the same act. "If the proviso of a statute be directly contrary to the purview of the statute, the proviso is good, and not the purview, because it speaks the latter intentions of the legislators." (Bacon's Abridg., tit. Stat. I, 2.)

But, again, the bank being legally established, and the bills being valid beyond dispute and vested in the hands of the bearer in 1865, with a right of action existing for twenty years to collect the debt due at that date, the right having accrued, and the statute of limitations having commenced to run as against the defendant, by no process could subsequent legislation intervene to cut short the time limited that existed at the date that the action accrued. This we think to be the law.

Bacon's Abridg. Stat. (D).
6 Arkansas, 266; Dickerson *vs.* Morrison.
2 Greene (Iowa) 243; Gordon *vs.* Mount.
2 " " 244; Hinck *vs.* Weatherford.
6 Smeedes & Marshall, 521; Nevitt *vs.* Bank of Port Gibson.
10 California, 307–8; Scarborough *vs.* Dugan.
11 Illinois, 54; Thompson *vs.* Alexander.
15 B. Monroe (Ky.) 19, 20, 25–6; Slack *vs.* R. R. Co.
23 Mississippi, 269; Boyd *vs.* Barringer.
11 Mass., 406; Holden *vs.* James.
14 Wendel, N. Y., 656; Jackson *vs.* Brooks.
3 N. Hampshire, 482–3; Woart *vs.* Winnick.
12 Louisiana, 728; Deal *vs.* Patterson.
17 Wallace, 599; Sohn *vs.* Watterson.
1 Wilson's Works, Eng. 460.

The courts do not sit to make laws but sit to expound the law as made, and if found unconstitutional will so declare them. (Art. 1, sec. 32, New Constitution of Georgia.)

HARVEY TERRY,
Plaintiff.

Supreme Court of the U. S.

HARVEY TERRY
vs.
THOMAS W. COSKERY.

Plaintiff in Error's Reply to the Arguments of Defendant in Error.

The defendant in error says: "This Act (March 16, 1869,) is not in conflict with the Constitution of the United States," citing as authorities—

McElymole vs. *Cohen*, 13 Peters, 327;
Ross vs. *Duval*, 13 Peters, 64;
Bacon vs. *Howard*, 20 Howard, 25;
Sohn vs. *Watterson*, 17 Wallace, 598;
Bronson vs. *McKinzie*, 1 Howard, 315;
Bank of State of Alabama vs. *Dalton*, 9 Howard, 527.

In *McElymole* vs. *Cohen*, the question was, "whether a judgment obtained in South Carolina, which by law of Congress of May 26, 1790, is made a debt of record, not examinable upon its merits, but when transferred into Georgia it did not carry with it the force of a judgment, in Georgia, upon which execution could be issued and enforced against persons and property in the latter State. But to give it the force of a judgment, in Georgia, it must be made a judgment there; and can only be executed in Georgia as the laws of Georgia permit."

The question of law involved in this case is one of comity between the several States, under the laws of the United States, and is determined by the statutes of the

United States and the *lex fori* of the action. The suit at bar is brought on a statute of Georgia, involving the *lex loci* and the statutes of that State alone. It is true it was held, in this case cited, that "the statutes of limitation in Georgia could be pleaded to a transcript of judgment obtained in South Carolina; but this decision involved only *the laws of the United States* and the *lex fori of the action*; while the present action involves only *the local laws of Georgia and the lex loci of the transaction.*

We cannot go to the laws of the forum to govern the laws enacted by the Legislature; and, it is submitted, that the authority cited does not apply to rule this action.

Our action is brought on the statute, plainly conveying the right of action; and said right of action is clearly admitted by defendant's plea to have existed before June, 1865, and the question here raised is, Was that right of action barred by subsequent legislation of said State? The plea as to the remedy in both cases is fully conceded, but in the former case the Supreme Court held that the *lex fori* would prevail; while in the present action the *lex loci* and the statutes of the State govern the cause.

91 Otto., 411–12–13, *Scudder* vs. *Union Nat. Bank.*

We do not ask exemption from any law in existence at the date of the transaction, for with the laws then of force our right of action is complete. We seek to maintain the *lex loci*; whereas, in the case cited, the *lex loci* was not brought in question, and only the *lex fori* disputed and adjudicated.

In *Ross* vs. *Duval*, the question was as to the power of the Legislature of Virginia to regulate the time for issuing executions on judgments. In that case the Supreme Court say—"It is a sound principle, that where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act; and the time

yet to run, being a reasonable part of the whole time, will be considered the limitation, in the mind of the Legislature, in such cases." In this case cited the judgment had run only one year, still having nine years to run before execution was barred on it by the act. In the case at bar, if the right of action had accrued at all before the passage of the act plead in bar, it had only run about nine months at the date of the passage of the act plead; and the right of action in the present suit was shortened some nineteen years (see plaintiff's argument, p. 56), if the debt sued on was due by the defendant at that date. The bank's bills, vouchers of the debt of the bank, may have been due by the bank at that date; but that fact is quite immaterial in this action. (*Cherry* vs. *Lamar*) the debt of the defendant remained unpaid at that date, and could not be discharged by subsequent legislation of said Legislature, under the present constitution.

Constitution of Georgia, 1868, Art. XI, Sec. 4–5;
Code of Georgia, 1867, §§ 1671, 1673, 1682, 1685, 1688;
54 Georgia, 404, *Central R. R.* vs. *State*;
6 Cranch, 135, *Fletcher* vs. *Peck*;

and the statute of charter is the evidence of the indebtedness of the defendant.

The preamble to the act plead in bar—the key that opens the minds of the Legislature, to show the law intended to be enacted—fails to show any intention to repeal said charter, or annul or bar the right of action under said statute, and repeal by implication (cannot be made) will not avail.

Preliminary Provisions of Code of Georgia, §§ 4 and 6.

But if plaintiff's right of action was for the ultimate liability, as in *Pollard* vs. *Bailey*, and as set out in the charter, then no right of action accrued to the plaintiff until June, 1870, the date of judgments shown. And

the rule laid down, and referred to in *White* vs. *Hart*, 13 Wallace, 654, and *Cherry* vs. *Lamar*, would be the rule here.

In the case cited (*Ross* vs. *Duval*), the question was as to the regulation of executions issued (on judgments then in existence) subsequent to the passage of the act in question. The question of corporate rights vested under a statute, and the liability of trusts and trustees for the performance of said trusts, are not raised in either of these opinions; yet these authorities will not sustain the defendant's plea. These opinions refer us to *Lewis* vs. *Lewis*, 7 Howard, 779, where the Supreme Court held that the plaintiff is entitled to the full time of the running of the statute of limitations that existed at the passage of the act.

Nothing could intervene to cut short the running of the limitations attached at the date that the right of action accrued.

Lewis vs. *Lewis*, 7 Howard, 799.

And the plaintiff's right of action, therefore, falls within the regulations of the Code of Georgia, and that regulation gives his right of action a validity of twenty years.

See Sec. 8, Act of March 16, 1869, Code of Ga., 1867, § 2865.

In *Bacon* vs. *Howard*, 20 Howard, 25, the question was, "Whether the right of action was barred on a foreign judgment in four years in Texas." Held, that the Constitution of the United States does not restrain the right of each State to legislate the remedy on suits on judgments obtained in other States.

In *Sohn* vs. *Watterson* 17 Wallace 599, cited as an authority against us, the Court say; "A statute of limitations may undoubtly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend

upon the language of the act, and the apparent intention of the legislature to be gathered therefrom. * * * But if an action accrued more than the limited time, before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such actions at once. It will be presumed that such was not the intentions of the legislature; such an intent would be unconstitutional. To avoid such a result and to give the statute a construction that will stand, Courts have given it a prospective operation. In doing this, three different modes have been adopted by different Courts. One is to make the statute apply only to causes of action arising after its passage. * * * * * *

Another rule is, to construe the statute as applying to such existing actions, only as have already run out a portion of the statutory time, but which have a reasonable time left for prosecution before the statutory time expires. * * * * * * * *

A third construction is that which was adopted by the Court below in this case; * * * It was substantially adopted by this Court in the cases of *Ross* vs. *Duval*, and *Lewis* vs. *Lewis*. * * * * The question is, says "Chief Justice TANEY," from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided."

The act of 1869, plead as a bar, is a peculiar act, seldom found on the statute books. It purports to be an act to limit accounts; yet, in the body of the act, it takes in every conceivable liability under the law, and the last section, 8, declares that all cases which have arisen on the right of action, or liability accrued, or the contract, has been made since June 1, 1865, shall be controlled by the code of Georgia.

From what time is the limitation to be calculated?

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From what time is the limitation to be calculated?

From the date of the insolvency of the bank, as plead. It is possible that the bank never was solvent; and insolvency is not given as a cause of action against the corporation. The right of action against the corporation accrued upon the failure to pay on demand. The first failure, or act of bankruptcy shown, is the assignment of the bank in 1866. But the right of action of the plaintiff did not exist at that date. His right of action against the defendant did not exist on the bills of the bank, and if the plaintiff had sued the defendant on the bills of the bank for said stockholders ultimate liability before the assets of the bank were exhausted, he could have been non-suited on his action, as in Bailey's case the action did not lie until the assets were exhausted as shown in this petition, *Pollard* vs. *Bailey*. That date is shown to be June 23, 1870, by decree of judgment against the bank and assignees.

But how does the act of 1869 get jurisdiction and apply to bar the present action. It certainly does not do so by direct legislation contained in the act, strictly construed. The act fails to set out that it shall be a bar to the remedy of any right of action accruing under statutes of the State, then in existence, for the protection and redemption of bank notes circulated as money; and said act fails to cite or quote any particular act or statute to be repealed by it; and if the 3rd section is held to do so by implication, then said act is clearly unconstitutional under the authority of *Sohn* vs. *Waterson* just cited; and it is clearly unconstitutional under the constitution of Georgia then in existance. Art. 3, Sec. 6, Par. 3. Preliminary provisions of code, section 4 and 6. Said act does not prescribe for the future, it only acted on past transactions, to bar the remedy on vested rights, then in existence at its passage; but did not bar the remedy on rights of actions that were made or accrued after its passage; such legislation cannot be made under the Constitution

fo Georgia, and jurisdiction of the act to bar this action cannot be made by implication.

But what was the intentions of the legislature? Have they indicated any intention in said act to bar the rights of action of the holders of bank bills for the debts of the creatures of their own creation? In what part of said act is it expressed? Which is the act repealed by it? *None.* Then if no repeal is set out in the act, nor any law described to be annulled by said act, the powers of the legislature delegated by the constitution under which they acted, did not convey to said legislature the authority to create any bar to the remedy of plaintiff's right of action, as plead in this cause. They are prohibited from doing so by the constitutional provisions shown in this argument; but the act itself shows no intention to do so, and the plea only raises that application of the act by implication, and not by the words themselves. This fact is shown by the ruling of the Supreme Court of Georgia. In the case of *Addison* vs. *Christy*, 49 Georgia 433, the Court says: "It was also objected that the 8th section could not have been intended to take away the benefit of the suspension acts.

No one has ever denied, or can deny, that it did have, and was, without all doubt, intended to have that very effect in all cases of actions which accrued prior to June 1, 1865. *It simply* said "that all such actions must be brought by January 1, 1870." Implication is clearly and fully shown in this ruling. But plaintiff submits such ruling is not law, and cannot be made law under the present constitution of Georgia. And the plea plead in this action is clearly a plea by implication and not by the words of the statute.

But, even admitting the plea to be true, as plead, the plaintiff in error was not within the ~~provision~~ of the act plead; his right of action did not accrue for the ultimate liability of the defendant, until the assets of the bank

were exhausted June, 1870. (The same as Pollard's case.) And the law had expired by its own limitation before the right of action arose; and to apply the act as plead, (if we admit the plea to be true—but we deny the plea,) then the act is clearly unconstitutional. *Sohn* vs. *Watterson*. The plaintiff pursued his equitable remedies for the collection of his debt, so long as that remedy was available, and when the assets of the bank were exhausted and the liability of the defendant liquidated by that process, then the plaintiff resorted to his remedy at law, crediting the defendant with the proportionate sum collected from the corporation.

But the plaintiff assumes another ground of defence to said plea. The plaintiff is a non-resident of the State of Georgia. The bank bills—vouchers of the debt sued on, came to the plaintiff subsequent to the year 1870, for value. The bank's charter existed and continues of full force. The right to circulate and receive said bank's bills continues for the time that was enacted in the charter. And as to the plaintiff, no right of action accrued to him against said defendant, stockholder, until he was the bearer of the bills: and he received his bills subsequent to 1870; subsequent to the date that said act, plead in bar, expired by its own limitation.

This fact is proved, (Record, folio 94), and stands admitted. (Folio 89.) At that date, (if charter existed at all,) plaintiff had a vested right of action for twenty years.

But here the defendant interposes his plea, and says, "your right of action commenced in 1865, by the insolvency of the bank." But insolvency of the bank does not constitute a cause of action against the defendant, under the statute. And it is submitted, that unless insolvency of the bank did constitute a cause of action against the defendant, then said plea cannot be true, and is of no avail and void: but for the purposes of this

argument, concede that plaintiff's right of action accrued as plead,—before June, 1865. And what is the effect of it? Plaintiff then had a vested right of action, as a non-resident for twenty years. The stay laws existed of force until July, 1868. And under the defendant's own showing, the plaintiff had only seventeen months and ten days in which to enforce his right of action, if he had held the bills. And the plaintiff's right of action was decreased from twenty years to seventeen months and ten days time, by the act plead.

The plaintiff, a non-resident, holding vested rights, secured by a trust, without the sitz, and before the plaintiff comes within the sitz or forum, he is barred by an act expired by its own limitation. This effect cannot be given to the act.

Wharton's Conflict of Laws, Secs. 377*a*, 378, 379.

The purview of the act plead, extended only to 1870. How, then, was the plaintiff within its purview, in 1872, except by repeal of the charter? And that has not been plead.

If the plaintiff came in possession of his vouchers of debt, in 1872, under a valid law of that date, "from what time is this limitation to be calculated? It would seem clear, (upon principle,) that it must commence when the cause of action is first subjected to the operations of the statute, unless the legislature has otherwise provided."

Sohn vs. *Watterson*, 17 Wallace, 600.

Has the Legislature of Georgia otherwise provided in the act plead? Has the legislature in any act declared the circulation and passage of bank bills to be illegal and void? Not so. But the public policy of the State of Georgia has always been to legalize, encourage, and protect bank issues beyond any other securities. And the presumption of law is, "not that the legislature intended to in-

clude bank bills in the act of 1869, but upon the principle of *expressio unius, exclusie alterius*, excludes such a construction of the act. Besides the fair and reasonable construction of the Act itself, the constitution of Georgia forbids the enactment of such law, as plead by defendants. It is unconstitutional and void as a bar to the present action, under the Constitution, if the legislature intended to make it such; and the legislature must be construed to mean what they plainly say.

Article XI, Section 4 and 5.

Article III, Section 6, Paragraph 3.

But again: At what date was the cause of action first subjected to the statute? The bank's bills—vouchers in the action—came to plaintiff and were protested in 1872, and the plaintiff contends that no default as to these bills occurred until the date of demand and protest. Certainly no actual default or act of bankruptcy was committed by the bank until the assignment of the bank in 1866. And if this Supreme Court holds that the bills came within the statute at that date, then, under the ruling of the Supreme Court of Georgia, in *Addison* vs. *Christy*, 49 Georgia, 432, this action falls within the 8th Section of said Act, and is ruled by it, or rather, it is ruled by the Code of Georgia, and plaintiff's rights are saved under the Code.

There is no defence that the debt sued on is illegal or that it accrued to the plaintiff before he was the bearer of the bills; and the purview of the Act plead only extended to January 1, 1870. Wherein is the plaintiff subject to a law, expired by its own limitation, before he comes within the sitz? And the defendants plea must fail on that ground. The plea is not broad enough to cover the cause of action as stated in the petition.

No time is given wherein plaintiff could enforce his right of action, and no evidence of the defendant has

been given to show that the petition is untrue. The petition stands unimpeached—and for the purposes of this suit, it is true, the defence must fail.

7 Howard, 787, *Lewis* vs. *Lewis*;

15 Howard, 421, *Murray* vs. *Gibson*.

The cited authority of *George* vs. *Gardner*, to sustain the constitutionality of the Act of 1869, is a ruling of the Supreme Court of Georgia upon the common law, and it is not a ruling upon a right vested under a statute secured by a trust. In that ruling the Court use this doubtful and uncertain language:

"The Act of 1869 is a general law, and has general operation throughout the State, as to the class of contracts named in it. The private rights of no particular individual are specially varied or affected by it, as contemplated by the 26th Sec., Art. I of the Constitution of 1868. This construction of the Act of 1869 does not invade or impair the obligation of the plaintiff's contract, and thereby render the Act unconstitutional, it only affects his remedy on that contract."

The Court in that ruling did not discuss the effect of Article XI, Sec. 4 and 5, of the Constitution of 1868; nor the effect of Article III, Sec. 6, Par. 3, of said Constitution on the Act of 1869; nor have they done so, in any other ruling to be found in the adjudicated cases.

The ruling cited, is made on a common law action, while the case at bar, is founded on a statute against indemnities of a trust, and comes directly and clearly under Article XI, Sec. 4 and 5, of said constitution. The ruling cited, as shown by this reference, is not a parallel case to the action at bar, and therefore is not an authority in this action. This action is protected by Article XI, of said Constitution.

In *Kimbro* vs. *The Bank of Fulton*; the right of action was founded on the contract of the corporation running

to the holder of the bills, and was discussed and passed on as a common law right of action; and the validity of the bills sustained under the pleadings, although suit was brought in 1871, on the bills of a bank that failed or ceased to do business in 1865. In this ruling, in their reasoning, the Court would seem to imply that said bank bills were barred by said Act, if the fact appeared in the pleadings, that said bills had ceased to be used as currency before June 1st, 1865; but the action of the Court had the contrary effect, by giving judgment for the plaintiffs. The action at bar is not upon a contract between the parties, but this action is on the statute. It is the law that binds the defendant to perform and liquidate his liability, "*Prout Dubuit.*"

Branch vs. *Baker*, 53 Georgia, 511.

We are cited to the case of *Bank of the State of Alabama* vs. *Dalton*, 9 Howard 527. This was a suit to enforce a judgment in Mississippi, that was of more than two years standing in Alabama; and under the laws of Mississippi the right of action on all foreign judgments coming into that State, were barred after two years. We fail to see any application of this authority to the present action.

We are also cited to the case of *Bronson* vs. *Kinzie*, 1 Howard 315: In this case the Court say: "If the laws of the State, passed afterwards, had done nothing more than change the remedy upon contracts of this discription, they would be liable to no constitutional objection. For undoubtedly a State may regulate at pleasure the modes of proceeding in its Courts, in relation to past contracts as well as to future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. * * * * * And although a new remedy may be deemed less convenient than an old one, and may in some degree render the recovery of debts more tardy and difficult, yet it

will not follow that the law is unconstitutional. Whatever belongs merely to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." ☞And refers to 8 Wheaton, 1 *Green* vs. *Biddle*. With these authorities cited by the defendant, the plaintiff is content to rest his case; but he has also cited the cases of *Samples* vs. *Bank*, 1 Woods, C. C. R. 528–9., and *Terry* vs. *Tubman*, 92 Otto 156. In Samples' case the circuit Judge held " that he was controlled by the opinion of the Supreme Court of Georgia in their opinion in *Kimbro* vs. *Bank of Fulton*, (heretofore discussed) and places the reason for his ruling on that authority. But the plaintiff submits that said Court, (as we have shown) erred in adopting that ruling as law, or controlling this action. The circuit Judge was not bound by the ruling of the State Court; 18 Wallace 546, *Boyce* vs. *Tabb*. The action against the Bank of Fulton, was for "*a jus in re*," while the present action, is for "*a jus ad rem*." In the former case, it was against a principal upon the promise; In the present action it is against the idemnity; made liable by the statute as a trustee for the performance of a trust. In that case the Court held that if the notes were barred as against the corporation then they were also barred as against the stockholder, but under the statute, in the present action, the stockholder is made ultimately liable for the redemption of the bills, independent of the corporation, and therefore that authority will not apply in this case. But the principle laid down in *Sparks* vs. *Pico*, 1 McAllister 499–500, and *Huges* vs. *Edwards*, 9 Wheaton 497–8, and *Elkins* vs. *Edwards*, 8 Georgia 326, and *Thayer* vs. *Mann*, 19 Pickering 537, would be the rule in this case; and, as

ruled in *Cherry* vs. *Lamar*, it would be quite immaterial if the bills were barred as against the bank, the debt remained a subsisting liability against the stockholder. These liabilities exist for different reasons, they arise under different obligations and are controlled upon different principles. The personal liability clause of the charter, Sec. 9, Prince's Dig. 117, reads as follows: "The persons and property of the stockholders, * * * * shall at all times be pledged and bound in proportion to the number of dollars issued upon each of the shares that each individual or company hold, possess or are interested in, * * * for the payment and discharge of the debts or contracts of said bank, or for the ultimate redemption of all notes or bills issued, or that may hereafter be issued, by or from the said bank, * * * in the same manner as in simple actions of debt or common commercial cases." And part of Section 7 reads, "And if the said corporation shall at any time refuse or neglect to pay, on demand, any bill, note, or obligation, issued by the corporation according to contract, promise, or understanding, therein expressed, the charter hereby granted shall be forfeited." This liability of the defendant is of record in the statute, and is a record of the highest dignity. A mortgage debt is recorded, but of lower dignity.

Squaring this condition of the grant of charter, by the authority laid down in *Sohn* vs. *Watterson*, then plaintiff's right of action extends to the year 1885.

Under this statute, the plaintiff had two rights of action on his bills. One right of action was against the corporation, upon the refusal to pay on demand: that was upon the contract of the bank running to the bearer of the bills. And he had a further right of action against a stockholder, upon proof of the condition broken in the grant. That was upon the statute of charter, which

made the stockholder liable to perform that condition upon due proof of condition broken. That liability of the stockholder, sued for in this action, existed in the second degree as an indemnity. And if the plaintiff had an immediate right of action in the first degree against said defendant, stockholder, as against the maker of the bills. Yet, the plaintiff submits that it was more equitable to pursue his remedy in the second degree, after the assets of the corporation were exhausted, and the benefit of those assets were duly credited upon the defendant's liability, than to have pursued his right of action against the defendant, before the corporation was exhausted, and before the credit was made on the debt of the defendant. There is no provision in the statute requiring bill holders to sue for the debt of the bank, or to sue for the ultimate redemption of the bills. The creditor may elect his remedy by any proper process.

Accepting the literal words of the Act, and the proofs made in the cause, when was the plaintiff's right of action first subject to the statute? The judgments bear date June 23, 1870. The bills were protested July, 1872. Then, if we take the literal words of the Act, those dates must be held, as the dates when the right of actiou was first subject to the statute, and limitations run from those dates.

93 Otto, 98–'9; *Bird, et al.* vs. *Louisiana State Bank.*
8 Georgia, 476, Par. 6, 2 dly; *Lane* vs. *Morris.*
Heyts' Digest, 809, Sec. 50.
2 Sneed Tenn, 482; *Bank of Memphis* vs. *White.*
7 Johnson's Chancery, N. Y., 90; *Kane* vs. *Bloodgood.*

The law making the bank bills legal, and authorizing their issue, also prescribed their tenor and form and the terms of issue. Those terms were, "will pay the bearer on demand." This *quasi* contract was the *act or terms of the law to make the bill valid.* When the first taker of the

bill delivered it to some other person, then the law directed payment to him. This is the terms prescribed in the Act to make the bill valid. And each new bearer of the bills is to be regarded as having received them of the bank at that date delivery. Upon this state of facts, how is it possible that the plaintiff is within the purview of the act of 1869, if his petition is true. By its statement, it would seem a flat contradiction.

On defendant's brief, pages 2, 3, and 4, he says—

"The only remaining question, and, indeed, the only question that was seriously urged in the Circuit Court, is the constitutionality of the Act of Limitations of March 16, 1869. This point does not appear in *Terry* vs. *Tubman*, and is still to be passed upon by this Court. It has been repeatedly decided by the Federal Courts in Georgia, (see *Samples* vs. *Bank*, 1 Wood's Rep., where it is clearly and well stated). * * * *

"*It is further to be remarked, that this Act only applied to causes of action that had accrued nearly four years before its passage, from June* 1, 1865, *to March* 16, 1869, and the transactions at which it was aimed were either of eight years standing (before the war), or else had arisen during a state of affairs that rendered it peculiarly difficult to arrive at just rules of decision.

"*Most of the cases covered by the Act would have beeu barred before its passage*, but for the supension of the statutes of limitations during the war. In short, it was an *Act demanded by the public good*, and has now for eight years been in full force, upheld by every authority, State and Federal, and, I believe, will not now be overturned by this Court, without stronger reasons than seem to me to exist."

Here, then, we have the key to reasons for the act given by the defendant. It was an act of expediency to protect debtors from their liability to pay their debts. Defendant says it was aimed at debts that had occurred nearly four years before its passage, or eight years standing before the war; (in modest terms it was a legal repudiation of liabilities to pay debts,) and if aimed at debts that was contracted before the war, it was aimed at debts that was incurred at a gold value, and not particularly at confederate transactions made during the war.

It is here clearly admitted to be a class legislation to

affect only those rights of action in existence at its passage; but did not affect, and was not intended to affect, liabilities that accrued after its passage.

It is not seriously contended that said act is a sound constitutional law, but it is pleaded and excused as an expedient measure, as a merciful law, as a specific for the ills of the war.

It is not contended in defendant's argument, neither in any ruling found in the books, that said act is a constitutional and valid act as plead in this cause under Article XI, sections 4 and 5, of the Constitution of 1868. Said act is a parcel and part of the same class of legislation sought to be enforced by Article V, section 17, of the Constitution of 1868, as heretofore declared unconstitutional by the Supreme Court of Georgia, in *Branch* vs. *Baker*, 53 Georgia, 511, and heretofore declared unconstitutional and void by this Court in *White* vs. *Hart*, 13 Wallace, 647.

In *Sample* vs. *Bank*, 1 Woods, 529, the Court cite "2 Black., 599; *Leffingwell* vs. *Warren*, in support of said ruling."

This was an action of ejectment to recover lands held by the defendant under a tax title deed in the State of Wisconsin, and arose from default of the plaintiff to pay his taxes under the laws of the State as it existed at the date of the default of the said plaintiff to pay his said tax; and this suit was to test the limitation laws of that State as they existed and had been construed by the Supreme Court at the time the default of the plaintiff in ejectment occurred. The Supreme Court of the United States very properly sustained the limitation laws of Wisconsin as they existed at the date of the default of the plaintiff. The Court say: "The equities of the plaintiff are very strong. We have felt their force. Without any fault on his part, he has been divested of

his title to his land. But our duty is to apply the law—not to make it."

The plaintiff at bar pleads for the enforcement of his rights of action, under the law as they existed in Georgia at the date of the issue of his bills, and as his rights of action existed at the date said action accrued. In other words, the plaintiff here asks that this Supreme Court will construe the limitation laws of Georgia under the *lex loci* of the transaction, and as they vested in the cause. Not to stretch the law to aid the plaintiff, nor to contract the law to shield the debtor. Not to make the law; but to construe the law as made, at the date the right in action vested. And if the Act of 1869 has intervened to cut short the plaintiff's right of action as plead in this cause, then the authority of this Court is invoked to declare said act unconstitutional and void as a bar to said action. State legislation may conclude or bind a contract, but subsequent legislation cannot set it aside.

16 Howard, 369, 415; *State Bk. of Ohio* vs. *Knoop.*
7 Cranch., 164; *State of New Jersey* vs. *Wilson.*
18 Howard, 331; *Dodge* vs. *Wilson.*
6 Cranch., 135; *Fletcher* vs. *Peck.*
18 Howard, 384,–5; *Mechanics & Trad. Bk.* vs. *Thomas.*
8 Wallace, 438–9; *H. of F.* vs. *Rouse.*
6th Ed.; *Angel on Limitations*, § 80, 113, 137, 166.
6 Wheaton, 481; *Prevost* vs. *Gratz.*

HARVEY TERRY.

Supreme Court United States,

OCTOBER TERM, 1876.

No. 993—(ARGUED WITH No. 266.)

HARVEY TERRY
vs.
THOMAS W. COSKERY.

Error to the Circuit Court for Southern District of Georgia.

BRIEF OF W. H. HULL, FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

HARVEY TERRY
vs.
THOMAS W. COSKERY. } Error to the Circuit Court of the United States, for Southern District of Georgia.

Brief of W. H. HULL, for Defendant in Error.

This case is, in all its essential features, identical with Terry vs. Tubman, reported in 92 U. S. Reps., (2 Otto) page 156.

This is a suit by a holder of bank bills against a stockholder of the "Union Bank," to enforce a personal liability imposed by the charter. The clause relied on is section 9 of the charter of the "Bank of Brunswick," which name was afterward changed to the "Union Bank," and is found in Prince's Digest Laws of Georgia, p. 117, and is as follows: "The persons and property of the stockholders in the Bank of Brunswick with banking privileges, shall at all times be pledged and bound in proportion to the number of dollars issued upon each of the shares that each individual or company hold, possess, are interested in, or entitled to, in the said Bank of Brunswick, for the payment and discharge of the debts or contracts of said Bank, or for the ultimate redemption of all notes or bills issued, or that may be hereafter issued by and from the said Bank of Brunswick, with banking powers and privileges, in the same manner as in simple actions of debt or common commercial cases."

This, though different in wording, is in legal effect the same as the charter of the Bank of Augusta, cited in Terry vs. Tubman. See 2 Otto, 156. In both the liability is for a proportional share of the bills, expressed

in that case to be "in proportion to the number of shares," and in this "in proportion to the number of dollars issued on each of the shares held." In both the liability is "ultimate."

The defendant's plea set up, as a bar, the Act of Limitations of Georgia of March 16th, 1869, found in the volume of the Acts of that year, pages 133 and 134, and quoted as fully as is necessary in Terry vs. Tubman—2 Otto, 157.

The plea was identical with that filed in Terry vs. Tubman, and every fact pleaded was sustained by evidence. See the depositions of W. E. Jackson and F. H. Miller in the Bill of Exceptions.

The plaintiff attempted, as to a portion of his claim, to draw a distinction by insisting that he had a *judgment* against the Bank, referring for proof to a record of a suit in equity in the Superior Court of Richmond County, Georgia, which he had attached to his declaration.

If he had shown a judgment it would not have effected the rules laid down in Terry vs. Tubman, for his right of action was complete without one; but I need not argue that, for an inspection of the record of the suit in Richmond Court shows that neither the Bank nor any stockholder was in any way a party to that suit. It was a suit of one Dobbins and other creditors of the Bank against the *assignees*, to whom the Bank had assigned its assets for the benefit of creditors, and against them *alone*. The Bank is nowhere mentioned as a party and the words of the decree, relied on by plaintiff, declaring certain persons to be creditors of the Bank, was entirely for the purpose of accounting with the assignees.

There is nothing to distinguish this case from Terry vs. Tubman, in which this Court held, without a dissenting opinion, "that the facts alleged in the plea are sufficient to make it a good plea; in other words, that the cause of action, so far as there is a separate and distinct right of action in favor of each bill-holder, was in force on the 1st of June, 1865," and consequently was barred by the Act of March 16th, 1869.

The only remaining question, and indeed the only question that was seriously urged in the Circuit Court, is the *constitutionality* of the Act of Limitations of March 16th, 1869.

This point does not appear in Terry vs. Tubman, and is still to be passed upon by this Court.

It has been repeatedly decided by the Federal Courts in Georgia. See Samples vs. the Bank, 1 Woods' C. C. Reps., 528 and 529, where it is clearly and well stated.

It has been decided also by the Supreme Court of Georgia, both as to the Constitution of the United States and that of Georgia. George vs. Gardner, 49 Ga. Reps., 441.

That a Statute of Limitations extending or restricting the time allowed for bringing suits, may constitutionally apply to causes of action in existence at the time of its enactment, provided only that a reasonable time be allowed to parties to enforce their rights, has been repeatedly decided by this Court, and is universally recognized law in the United States. See McElmoyle vs. Cohen, 13 Peters, 327; Bronson vs. Kinzie, 1 Howard, 315; Bank of the State of Alabama vs. Dalton, 9 Howard, 527; Sohn vs. Watterson, 17 Wallace, 599.

In the case last cited, this Court says: "A statute of limitations may undoubtedly have effect upon actions which have already accrued, as well as upon actions which accrue after its passage."

Does the Act in question allow a reasonable time in which plaintiffs may commence their actions?

I find no decision defining what is a reasonable time.

Evidently that is a question for the Legislature, and only in an extreme case will Courts assume to annul their decision.

In this case the time allowed for bringing suits after the passage of the Act, is nine and one-half months, ample to allow the law to be heard of in any part of the United States, and suit to be commenced within the limited time. Courts cannot require more without trenching on Legislative power.

It is further to be remarked, that this Act only applied to causes of action that had accrued nearly four years before its passage, from June 1st, 1865, to March 16th, 1869, and that the transactions at which it was aimed

were either of eight years standing (before the war) or else had arisen during a state of affairs that rendered it peculiarly difficult to arrive at just rules of decision.

Most of the cases covered by the Act would have been barred before its passage but for the suspension of the statutes of limitations during the war.

In short, it was an Act demanded by the public good, and has now for eight years been in full force upheld by every authority, State and Federal, and I believe will not now be overturned by this Court without stronger reasons than seem to me to exist.

W. S. Scull
Counsel for Defendant in Error